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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

THE HONORABLE JOHN MCBRYDE,

Petitioner,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

APPENDIX

(Vol. I of II)

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164pgs

CONTENTS OF APPENDIX

Volume I

A Opinion of the Court of Appeals 1a

B Opinion and Final Order of the District Court 52a

C [Review] Committee Memorandum and Order 125a

D [Judicial Council] Order and Public Reprimand 159a

Volume II

E Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation Into the Conduct of, Judge John H. McBryde 163a

F Order Denying Petition for Rehearing *En Banc*, and Opinion of Judge Tatel, Joined by Judge Sentelle, dissenting from the Denial 302a

G Excerpts from the Constitution of the United States 305a

H Judicial Conduct and Disability Act of 1980 . . . . . 308a

I Opinion of Fifth Circuit in *In re McBryde* 315a

APPENDIX A

United States Court of Appeals
for the District of Columbia Circuit

Argued November 7, 2000 Decided September 21, 2001

No. 00-5016

THE HONORABLE JOHN H. MCBRYDE,
UNITED STATES DISTRICT JUDGE FOR THE
NORTHERN DISTRICT OF TEXAS,
APPELLANT,

v.

COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND
DISABILITY ORDERS OF THE JUDICIAL CONFERENCE OF THE
UNITED STATES, ET AL.,
APPELLEES.

Appeal from the United States District Court
for the District of Columbia
(No. 98cv02457)

Before: WILLIAMS and TATEL, *Circuit Judges*, and SILBERMAN, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Separate opinion filed by *Circuit Judge* TATEL, concurring in part and dissenting in part.

WILLIAMS, *Circuit Judge*:

On December 31, 1997 the Judicial Council of the Fifth Circuit (the "Judicial Council" or "Council"), acting under the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c) (the "Act"), imposed sanctions on the Honorable John H. McBryde, United States District Judge for the Northern District of Texas. The sanctions followed a two-year investigation by a Special Committee of the Judicial Council ("Special Committee"), including nine days of hearings. The Committee took evidence relating to incidents spanning the entirety of Judge McBryde's judicial career and involving encounters with judges and lawyers both inside and outside his courtroom. (We will consider an example from the exhaustive record when we address Judge McBryde's argument that the Council illegally considered the merits of his judicial decisions.)

The investigation culminated in a 159-page report in which the Special Committee concluded that "Judge McBryde ha[d] engaged for a number of years in a pattern of abusive behavior" that was "'prejudicial to the effective and expeditious administration of the business of the courts.'" *Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde* at 150-51 (Dec. 4, 1997) ("Committee Report") (quoting 28 U.S.C. § 372(c)). The Report also recommended a variety of sanctions based on the provisions of § 372(c)(6)(B): that Judge McBryde receive a public reprimand, pursuant to subsection (v); that no new cases be assigned to him for a year, pursuant to subsection (iv); and that he not be allowed for three years to preside over cases involving any of 23 lawyers who had participated in the investigation, pursuant to subsection (vii) (providing for "other action" considered appropriate in light of circumstances). See Committee Report at 152-58. The Judicial Council endorsed the recommendations and issued an order imposing the recommended sanctions. See *In re: Matters Involving United States District Judge John H. McBryde, Under the Judicial Conduct and Disability Act of 1980,* No. 95-05-372-0023 (Jud. Council 5th Cir. Dec. 31, 1997) ("Judicial Council Order"). The lawyer-related disqualification

became effective on February 6, 1998, but the Council stayed the reprimand and the one-year suspension pending review by the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States (the "Review Committee"). On September 18, 1998 the Review Committee substantially affirmed the Council's action and lifted the stay. See *In re: Complaints of Judicial Misconduct or Disability,* No. 98-372-001 (Jud. Conf. U.S. Sept. 18, 1998) ("Judicial Conference Report").

Soon thereafter Judge McBryde brought suit in district court, claiming that the Act, both facially and as applied, violated the due process clause and the Constitution's separation of powers doctrine.[1] He also claimed that the initiation and conduct of the investigation against him exceeded the authority granted by the statute. Finally, he posed a First Amendment challenge to the Act's restrictions on disclosing the record of the proceedings. On cross motions for summary judgment, the district court agreed with Judge McBryde's First Amendment argument, *McBryde v. Committee to Review Circuit Council Conduct and Disability Orders,* 83 F. Supp. 2d 135, 171-78 (D.D.C. 1999), but rejected the rest. Only Judge McBryde appealed; here he repeats the essence of his remaining arguments.

Judge McBryde's claims are moot insofar as they distinctively relate to the one-year suspension, which expired on September 18, 1999, and the three-year disqualification, which expired on February 6, 2001. Certain of the non-moot claims are barred by the Act's preclusion of judicial review, 28 U.S.C. § 372(c)(10), namely the "as applied" and statutory challenges; the district court was therefore without jurisdiction to hear them. We vacate the district court's judgment insofar as it addressed the moot or precluded issues. Judge McBryde's remaining constitutional challenges fail on their merits; we therefore affirm the

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[1] Defendants/Appellees in this case are the Review Committee; Judge William J. Bauer, individually and as Chairman and as member of the Review Committee; the Judicial Council; and Judge Henry J. Politz, individually and as Chief Judge of the Court of Appeals for the Fifth Circuit and as presiding member of the Judicial Council, at the relevant times.

district court's ruling. We address first mootness, then preclusion, and finally the merits.

* * * * * *

Article III, Section 2 of the Constitution permits federal courts to adjudicate only "actual, ongoing controversies." *Honig v. Doe*, 484 U.S. 305, 317 (1988). If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot. See, e.g., *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992). This requirement applies independently to each form of relief sought, see *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000), and "subsists through all stages of federal judicial proceedings, trial and appellate," *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990).

The one-year and three-year bans have expired. No relief sought in this case would return to Judge McBryde the cases he was not assigned or otherwise improve his current situation. These claims will therefore be moot unless they are "capable of repetition, yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Both the Supreme Court and this court have held that "orders of less than two years' duration ordinarily evade review." *Burlington Northern R.R. Co. v. Surface Transp. Bd.*, 75 F.3d 685, 690 (D.C. Cir. 1996); see also *Southern Pac. Terminal Co. v. ICC*, 219 U.S. 498, 514-16 (1911). So the one-year exclusion safely qualifies. We will assume in Judge McBryde's favor the same for the three-year exclusion.

But are the injuries "capable of repetition"? Stated more formally, this requires "a reasonable expectation that the same complaining party would be subjected to the same action again." *Weinstein*, 423 U.S. at 149. When considering the likelihood that an injury will be repeated, the Supreme Court has in general "been unwilling to assume that the party seeking relief will repeat the type of misconduct that would once again place him or her at risk of that injury." *Honig*, 484 U.S. at 320 (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983); *Murphy v. Hunt*, 455 U.S. 478, 484 (1982); *O'Shea v. Littleton*, 414 U.S.

488 (1974)). *Honig* created an exception to this general principle on the ground that there it was the disabled respondent's "very inability to conform his conduct to socially acceptable norms that render[ed] him 'handicapped.'" 484 U.S. at 320. We have no basis for concluding that there is any parallel inability here.

In the cases cited by *Honig* the parties did not challenge the underlying laws that proscribed their potential future conduct. See, e.g., *O'Shea,* 414 U.S. at 496-97. Judge McBryde obviously does challenge the Act and the *authority* of the defendants to enforce norms of judicial conduct. But he does not appear to challenge the norms themselves. To be sure, he asserts that the Special Committee's report is vague and provides inadequate notice of what actions are prohibited. But the fundamental standard sought to be enforced by the defendants can plainly be discerned – that a judge should demonstrate at least a modicum of civility and respect towards the professionals with whom he or she works. The standard is also familiar, as it clearly echoes Canon 3(A)(3) of the Code of Judicial Conduct for Federal Judges. See Code of Judicial Conduct for United States Judges, Canon 3(A)(3); Judicial Council Order at 2. Judge McBryde does not, so far as we can determine, ever challenge this basic notion anymore than the plaintiff in *Lyons* claimed a right to engage in the sort of conduct that (he said) commonly led to police use of chokeholds. Indeed at oral argument counsel for Judge McBryde specifically acknowledged that at least some of the conduct "could be considered inappropriate." See Oral Arg. Tr. at 80-81. With this decision's confirmation of the Judicial Council's authority to sanction Judge McBryde for consistent failure to adhere to this norm, we think the risk of recurrence fairly slight. We recognize that docket limitations can be a very serious matter. See *Wozniak v. Conry,* 236 F.3d 888, 890 (7th Cir. 2001) (holding that depriving a tenured professor of *all* teaching and research responsibilities affected a property interest sufficiently to entitle him to some kind of a hearing). But here the two restrictions on Judge McBryde's docket have become moot.

The dispute over the public reprimand, however, remains alive. Any thought that the reprimand is a past and irreversible

harm is belied by the fact that it continues to be posted on the web site of the Fifth Circuit Court of Appeals,[2] with a link on the home page alongside items for current use such as the court's calendar and opinions.[3] Even absent that use of modern technology it would be a part of the historical record. Were Judge McBryde to prevail on the merits it would be within our power to declare unlawful the defendants' issuance of stigmatizing reports and thereby to relieve Judge McBryde of much of the resulting injury.

No one has suggested that this injury to reputation is not enough to afford Judge McBryde standing (the three-year limit was in effect at the time of oral argument). But we have a duty to be sure of our own jurisdiction, see *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986), so we consider the question. The Court has, of course, ruled that mere injury to reputation is not enough of an impingement on a person's liberty or property interest to trigger a requirement of due process. See *Paul v. Davis,* 424 U.S. 693 (1976). But injury to reputation can nonetheless suffice for purposes of constitutional standing. Thus, in *Meese v. Keene,* 481 U.S. 465 (1987), the Court found that a politician and film distributor had standing to challenge a government agency's stigmatizing as "political propaganda" foreign films that he wished to exhibit. The Court rested not only on affidavits indicating that this branding would affect his chances for reelection, *id.* at 473-74, but also on the impact on his reputation generally, *id.* Here, the official characterization of an apparently upstanding federal judge as having "engaged for a number of years in a pattern of abusive behavior" that was "'prejudicial to the effective and expeditious administration of the business of the courts'" inflicts, we think, enough injury. Committee Report at 150-51 (quoting 28 U.S.C. § 372(c)).

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[2] See <http://www.ca5.uscourts.gov/mcbryde.htm>, last accessed on June 20, 2001.

[3] See <http://www.ca5.uscourts.gov/>, last accessed on June 20, 2001.

At some point, however, claims of reputational injury can be too vague and unsubstantiated to preserve a case from mootness. See *Advanced Management Technology, Inc. v. FAA,* 211 F.3d 633, 636-37 (D.C. Cir. 2000). Insofar as the one-year and three-year suspensions may have continuing reputational effects on top of the defendants' express reprimand, they are not enough. The legally relevant injury is only the incremental effect of a record of the suspensions (since the fact of the suspensions can no longer be remedied), over and above that caused by the Council's and the Conference's explicit condemnations. See *Friedman v. Shalala,* 46 F.3d 115, 117-18 (1st Cir. 1995). And even as to that increment the most we could say at McBryde's behest is that in imposing and affirming the suspension sanction the Judicial Council and Review Committee performed acts reserved by the Constitution to the House and a two-thirds majority of the Senate. We cannot see how this would rehabilitate his reputation. Moreover, the Supreme Court has strongly suggested, without deciding, that where an effect on reputation is a *collateral* consequence of a challenged sanction, it is insufficient to support standing or, presumably, to escape mootness. See *Spencer v. Kemna,* 523 U.S. 1, 16-17 n.8 (1998). In this circuit, when injury to reputation is alleged as a secondary effect of an otherwise moot action, we have required that "some tangible, concrete effect" remain, susceptible to judicial correction. See *Penthouse Int'l, Ltd. v. Meese,* 939 F.2d 1011, 1019 (D.C. Cir. 1991).

* * * * * *

Although the injury to Judge McBryde's reputation preserves the public reprimand from mootness and affords standing, yet another question remains about our jurisdiction. The statute enabling the Judicial Council and Review Committee to consider Judge McBryde's conduct sets out the avenues through which a judge may challenge actions taken against him. 28 U.S.C. § 372(c)(10). It allows a petition to the Judicial Conference for review of a decision of the judicial council taken under § 372(c)(6). It then appears to preclude alternative avenues of review:

> Except as expressly provided in this paragraph, all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise.

28 U.S.C. § 372(c)(10). Twice in the past this provision has appeared before us, but on neither occasion did we need to resolve its meaning. See *Hastings v. Judicial Conference of the United States,* 829 F.2d 91, 107 (D.C. Cir. 1987) ("Hastings II"); *Hastings v. Judicial Conference of the United States,* 770 F.2d 1093, 1103 (D.C. Cir. 1985) ("*Hastings I*").

There are some claims that this section definitely does *not* preclude. The statutory language closely parallels that construed in *Johnson v. Robison,* 415 U.S. 361 (1974), where Congress provided that "decisions" of the Veterans Administration "on any question of law or fact" under certain laws "shall be final and conclusive," and expressly withheld jurisdiction from any court to review "any such decision." *Id.* at 365 n.5 (quoting the then-applicable version of 38 U.S.C. § 211(a)). The Court held that § 211(a) had no application to challenges to the constitutionality of the statutes in question, i.e., challenges to the decisions of Congress, not the Veterans Administration. See *id.* at 367. This interpretation allowed the Court to avoid the "'serious constitutional question'" that would be posed "if a federal statute were construed to deny any judicial forum for a colorable constitutional claim." *Webster v. Doe,* 486 U.S. 592, 603 (1988) (quoting *Bowen v. Michigan Academy of Family Physicians,* 476 U.S. 667, 681 n.12 (1986)). Similarly, the wording of § 372(c)(10) does not withhold jurisdiction over Judge McBryde's claims that the *Act* unconstitutionally impairs judicial independence and violates separation of powers.

This leaves four claims in addition to the facial constitutional challenges. Two of these four also invoke the Constitution, challenging the actions of the defendants in applying the Act to Judge McBryde. The first claim is that the defendants inflicted their sanction without providing him due process. This claim principally involves an assertion that the whole project arose out of a conflict between himself and then-Chief Judge Politz, whose actions furthering the investigation Judge McBryde regards as "retaliation" and who, he claims, combined "investi-

gative, charging, prosecutorial and adjudicative functions." Judge McBryde argues, in effect, that he was denied due process because Judge Politz refused to recuse himself. The second constitutional claim is somewhat obscure. He argues, in essence, that the *methods* used by the Judicial Council and Judicial Conference in imposing the sanction, were particularly invasive and therefore violated judicial independence. He cites two examples. When the Review Committee amended the Judicial Council's order so as to permit reinstatement if the council found that Judge McBryde had "seized the opportunity for self-appraisal and deep reflection in good faith," Judicial Conference Report at 24, it engaged (he says) in forbidden "judicial behavior modification." And the Judicial Council's use of psychiatrists for advice on Judge McBryde's mental health, and on the possible causes of his conduct, was "fundamentally destructive of judicial independence."

Beyond these constitutional claims are two phrased by Judge McBryde as assertions that the actions of the Special Committee, the Council and the Review Committee against him were "Beyond the Agencies' Statutory Jurisdiction." One of these claims is in fact an attack on the defendants' procedures, namely an argument that although the investigative process was launched by complaints formally filed under § 372, it widened as it went on to encompass conduct not mentioned in those initial complaints. The other is a claim that the defendants were without statutory authority to investigate and penalize Judge McBryde "for" the merits of his decisions and rulings (his characterization of defendants' actions). We conclude that § 372(c)(10) bars all four challenges.

As we said, two of the claims are framed in constitutional terms. When the Constitution is invoked, a claim of preclusion faces an especially high hurdle. "[W]here Congress intends to preclude judicial review of constitutional claims its intent to do so must be clear." *Webster,* 486 U.S. at 603(citing *Robison,* 415 U.S. at 373-74). And a series of cases in this circuit have held that this special clarity is necessary even for as applied challenges. See *Griffith v. FLRA,* 842 F.2d 487, 494-95 (D.C. Cir. 1988); *Ungar v. Smith,* 667 F.2d 188, 193 (D.C. Cir. 1981); *Ralpho v. Bell,* 569 F.2d 607, 620-21 (D.C. Cir. 1977). Under

these cases, we find preclusion of review for both as applied and facial constitutional challenges only if the evidence of congressional intent to preclude is "clear and convincing." The preclusive language here is quite similar to that of 5 U.S.C. § 8128(b), which the Court singled out in *Lindahl v. OPM,* 470 U.S. 768, 779-80 & n.13 (1985), as an "unambiguous and comprehensive" preclusion of review. See also *Czerkies v. Department of Labor,* 73 F.3d 1435, 1443 (7th Cir. 1996) (Easterbrook, J., concurring). But see *id.* at 1442 (majority opinion finding jurisdiction despite § 8128(b)); *Paluca v. Secretary of Labor,* 813 F.2d 524, 525 (1st Cir. 1987) (same). But under this court's *Ralpho* trilogy, we have not regarded broad and seemingly comprehensive statutory language as supplying the necessary clarity to bar as applied constitutional claims. See *Griffith,* 842 F.2d at 490 (citing 5 U.S.C § 7123(a) (1982)); *Ungar,* 667 F.2d at 193 (citing 22 U.S.C. § 1631o(c) (1976)); *Ralpho,* 569 F.2d at 613 (citing § 2020 of the Micronesian Claims Act of 1971). In the absence of explicit statutory language barring review of constitutional challenges, the opinions studied the legislative history, finding the clear and convincing standard unsatisfied in all three cases. *Griffith,* 842 F.2d at 494-95; *Ungar,* 667 F.2d at 196; *Ralpho,* 569 F.2d at 621-22.

We pretermit the possibility that the Supreme Court's decision in *Traynor v. Turnage,* 485 U.S. 535, 542-45 (1988), postdating the last of the circuit trilogy (*Griffith*), has undermined the trilogy's premise. It may have done so by treating the *Robison* decision (source of the circuit trilogy) as deriving more from statutory language allowing review of attacks on the facial validity of the provision being applied (whether the attack was statutory or constitutional), and less from ideas of special status for constitutional claims.

Assuming arguendo the full applicability of the circuit trilogy, however, we nonetheless find the requisite clarity of preclusive intent. Of course if the trilogy is read to require magic words expressly barring as applied constitutional attacks, they are not to be found. But the legislative history manifests express concern over the *Robison* issue and what appears to have been a deliberate congressional effort to assure that in practice ample

review would occur. Congress vested the authority for implementing the Act exclusively in the hands of Article III judges, providing for initial action by one group of such judges and for review by another group. Having done so, Congress clearly meant to be understood quite literally when it said in § 372(c)(10) that orders of the Judicial Conference or relevant standing committee "shall not be judicially reviewable on appeal."

The Senate bill would have established a special Article III court for review of misconduct findings – coupled with preclusion of any other review. S. 1873, as reported out of committee and as passed by the Senate, provided for creation of a "'court of record to be known as the Court on Judicial Conduct and Disability.'" See S. 1873, 96th Cong. § 2(a) (proposed 28 U.S.C. § 372(g)(1)) (as reported to the full Senate by the Judiciary Committee on October 10, 1979). "'The Court may exercise all appropriate judicial powers incident or necessary to the jurisdiction conferred upon it.'" *Id.* The bill precluded further review of the Court's actions in language similar to that of the final version: " 'There shall be no judicial review of any order or action of the Court taken under this subsection or subsection (h).'" *Id.* (proposed 28 U.S.C § 278(i)(3)). In discussing the new Court, the Committee report said:

> A national court of stature will help to alleviate the fear and public perception of a local "whitewash" of a citizen's complaint. It will also provide a forum for a judge who believes that the council of his circuit has acted against him in an unwarranted or unfair manner. In addition, by providing this court with broad discretionary power to regulate the number of cases it wishes to hear, the provision assures that a bureaucratic, excessively formalized procedure will be avoided.

S. REP. NO. 96-362, at 3 (1980), reprinted in 1980 U.S.C.A.A.N. 4315, 4317.

In the Senate debate, Senator DeConcini introduced a report commissioned by the Judiciary Committee's staff and prepared by Mr. Johnny H. Killian. The report directly addressed the *Robison* issue. After reviewing Supreme Court authority on whether *any* right of appeal was required, the report said:

> The Supreme Court in dicta in recent cases has hinted that preclusion of judicial review of constitutional claims might raise constitutional questions, *Johnson v. Robison,* 41[5] U.S. 361, 366-67, 94 S. Ct. 1160, 39 L. Ed. 2d 389 (1974); *Weinberger v. Salfi,* 422 U.S. 749, 761-762, 95 S. Ct. 2457, 45 L. Ed. 2d 522 (1975), but its concern appears to be that litigants at some point have access to an Article III court, *Territory of Guam v. Olsen,* 431 U.S. 195, 201-202, 204, 97 S. Ct. 1774, 52 L. Ed. 2d 250 (1977), and the Court on Judicial Conduct and Disability would be an Article III court.

125 Cong. Rec. 30,050/1 (Oct. 30, 1979) (remarks of Sen. DeConcini).

The House version called instead for review by the Judicial Conference. When it was returned to the Senate, Senator DeConcini expressed regret that the "Court" envisaged by the Senate bill had not survived. But he recognized the close similarity between review by that "Court" and by the Judicial Conference (or a standing committee thereof):

> Today's compromise substitute amendment is at least close to what was originally envisioned by the Senate this Congress, in that a permanent, independent standing committee of the judicial conference is authorized to be established. Such a body, while not an independent review court, will provide for uniformity of decisions and the building of precedents.

126 Cong. Rec. 28,090/2 (Sept. 30, 1980) (remarks of Sen. DeConcini).

Indeed, it is not clear whether there is any material difference between the two. In both cases, of course, the persons conducting the review are exclusively Article III judges. In both cases review is discretionary. 126 Cong. Rec. 28,092/3 (Sept. 30, 1980). Speaking of the Judicial Conference review, Senator DeConcini observed: "It is envisioned that over the long term these petitions will develop into something like petitions for writs of certiorari to the Supreme Court of the United States." *Id.*

It seems fair to suppose that both houses of Congress realistically expected that the Judicial Conference would hear all *serious* claims. Indeed, explaining its rejection of the Senate proposal for a new court, the House Judiciary Committee only

expressed concern that its formal character would unduly invite complaints *against* judges and thereby threaten judicial independence:

> In essence, the Committee rejected the special court feature of S. 1873 and certain other of its features because creation of a system in which complaints against federal judges could be so easily pressed to a formal adversary accusatorial proceeding raised the dangers of a substantial chilling effect on judicial independence, as well as the danger of infliction of harm and disruption of the administration of justice.

H.R. REP. No. 96-1313, at 18 (1979). The only discussion of the matter on the floor was the observation that "[t]here is also an appellate procedure which culminates in the Judicial Conference of the United States." 126 Cong. Rec. 25,370/3 (Sept. 15, 1980) (remarks of Rep. Gudger). Thus the House's expectations for review appear to be entirely consistent with those of the Senate. Only the means for providing the review were altered, and the shift seems to be due to a greater, not lesser, solicitude for judges' constitutional rights and interests.

Later developments seem to suggest that the risks the compromise sought to constrain were indeed substantial. According to the Administrative Office of the U.S. Courts, the year ending September 30, 2000 saw 696 complaints filed under § 372(c). During the same period, 715 complaints were concluded. Chief judges dismissed 359 complaints and judicial councils dismissed 354 more. Only two resulted in public censure and 162 remain pending.[4] Defending against these claims is disruptive and potentially expensive. See App. Br. at 52. Congress sought in the Act to give the judiciary the power to "keep its own house in order" by conducting its own investigations of misconduct. See S.REP. NO. 96-362, at 11, *reprinted in* 1980 U.S.C.A.A.N. at 4325. By adding review preclusion, they limited the potential disruption, while providing for adequate review in those few cases that might require it.

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[4] See *2000 Report of the Director*, Table S-22, Report of Complaints Filed and Action Taken Under Authority of Title 28 U.S.C. Section 372(c) available online at <http://www.uscourts.gov/judbus2000/tables/s22sep00.pdf>, last accessed on June 20, 2001.

We note that the Judicial Conference committee has disclaimed authority to rule on as applied, as well as facial, constitutional challenges:

> We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions.

Judicial Conference Report at 21, quoting its decision in No. 84-372-001. The committee offered no reason for this position. While we apply deference under *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), to agencies' jurisdictional decisions, see *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 694 (D.C. Cir. 2000); *Oklahoma Natural Gas v. FERC*, 28 F.3d 1281, 1283-84 (D.C. Cir. 1994), the statutory mandate to the committee appears to contain no language justifying a decision to disregard claims that a circuit judicial council has violated a judge's constitutional rights in application of the Act. See § 372(c)(10) (authorizing "review" by the Judicial Conference or a standing committee thereof). To be sure, agencies ordinarily lack jurisdiction to "'adjudicat[e] . . . the constitutionality of congressional enactments,'" *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 215 (1994) (quoting *Robison*, 415 U.S. at 368), "although the rule is not mandatory," *id.* But agencies do have "an obligation to address properly presented constitutional claims which . . . do not challenge agency actions mandated by Congress." *Graceba Total Communications, Inc. v. F.C.C.*, 115 F.3d 1038, 1042 (D.C. Cir. 1997). See also *Meredith Corp. v. F.C.C.*, 809 F.2d 863, 872-74 (D.C. Cir. 1987). We can see neither any reason why Congress would have withdrawn that power and obligation from a reviewing "agency" composed exclusively of Article III judges nor any indication that it has done so.

Thus Congress in the end enabled a sanctioned judge to seek review by Article III judges of the Judicial Conference of all claims except (presumably) facial attacks on the statute. As a

result, to read § 372(c)(10) to allow review of constitutional as-applied claims by conventional courts *as well* would generate substantial redundancy, an implausible legislative purpose. Moreover, whereas the legislative history of the statutes at issue in *Griffith* and *Ungar* reflected a "silent" or unexplained deletion of an exception for constitutional claims, see Dissent at 9-10, here Congress explained the deletion of the Senate's formal Article III court. The less formal version, the House Judiciary Committee thought, would be more protective of sanctioned judges, because the Senate solution risked generation of "formal adversary accusatorial proceeding[s]" that would "raise[ ] the dangers of a substantial chilling effect on judicial independence." H.R. REP. No. 96-1313, at 18 (1979). Although the difference in fact seems to us largely cosmetic, the House-induced change seems entirely consistent with the Senate's plan that review should cease once a single Article III panel, drawn from the Judicial Conference, had passed on the work of the sanctioning circuit.

In short, we find the evidence clear and convincing that Congress intended § 372(c)(10) to preclude review in the courts for as applied constitutional claims. Members of Congress were aware of *Robison* and more generally of doctrines presuming access to Article III review of decisions impinging on important interests. Put ultimately to a choice between review by an Article III "Court" and review by a committee of Article III judges chosen by and from the Judicial Conference, they chose the latter. They did so in order to protect judges from the "chilling" effects of unnecessary complaints, not with any expectation that the Judicial Conference would scant judges' rights.

Vesting the power to review facial attacks on the Act in the courts conforms fully to *Robison*; but reserving to the Judicial Conference committee *exclusive* authority over as applied constitutional challenges fulfills both the presumption in favor of access to Article III review of constitutional claims and the norm requiring "agencies" to avoid unconstitutional applications not mandated by Congress, at the same time as it prevents undue prolongation of the disciplinary process. Accordingly, we find that in § 372(c)(10) Congress clearly and convincingly

barred our review of Judge McBryde's claim of unconstitutional application of the Act.

We are left only with the two claims that defendants exceeded their statutory authority – the objections that the investigation impermissibly swelled beyond the scope of the initial complaints and that the Judicial Council sanctioned Judge McBryde for the merits of his decisions. Judge McBryde seeks an exception to the jurisdictional limitation for these claims under *Leedom v. Kyne,* 358 U.S. 184 (1958). But *Kyne* involved preclusion that had been *inferred* from the National Labor Relations Act, and is therefore merely an application of the familiar requirement that there be "clear and convincing evidence" of legislative intent to preclude review. See *Board of Governors v. MCorp Financial, Inc.,* 502 U.S. 32, 44 (1991) (internal citations omitted). Judge McBryde also seeks an exception allowing review under *Dart v. United States,* 848 F.2d 217 (D.C. Cir. 1988), where this court reviewed an agency action despite an explicit preclusion provision. But *Dart* stands for the exceedingly narrow proposition that a statute precluding review is limited by its language. "[T]he Veterans' Administrator cannot issue oil drilling permits – nor can the Secretary of Labor rescind television licenses – and expect to escape judicial review by hiding behind a finality clause." *Id.* at 224. Thus, in *Dart* itself we found that the Secretary of Commerce's order *reversing* an administrative law judge's decision did not enjoy the preclusion that the statute afforded an order to "affirm, modify or vacate" the ALJ's decision. See *id.* at 227-31. But *Dart* cannot mean that statutory insulation of a specific type of "order" from review is automatically ineffective whenever the complainant asserts legal error. And that is the most Judge McBryde claims here.

His complaint expansion theory is that the actions taken against him were not based on the merits of any properly filed or identified complaint, as provided for by 28 U.S.C. § 372(c)(1). Subparagraph (c)(4)(A) gives the chief judge the power to form a special committee "to investigate the facts and allegations contained in the complaint." Absent a complaint, we may assume, the Judicial Council could not make a valid order under paragraph (c)(6). Accordingly, Judge McBryde argues

that Circuit Rule 9(A), which allows a special committee to expand the scope of an investigation, is invalid; on that account, he claims, we do not have before us an "order" of the sort for which judicial review is barred by § 372(c)(10). But § 372(c)(5) explicitly gives a special committee the authority to "conduct an investigation as extensive as it considers necessary," and § 372(c)(1) states that a valid written complaint may be made by "any person." 28 U.S.C. §§ 372(c)(1) & (5). Thus Judge McBryde's objection reduces to arguments as to the exact reach of these provisions. Treating such a claim as involving a deficiency that would strip the defendants' acts of the character of "orders" for purposes of § 372(c)(10) would obliterate the section altogether.

Judge McBryde's statutory merits-relatedness claim also falls short. The Act itself is permissive when it comes to the investigation of claims that are related to the merits. The chief judge, under § 372(c)(3) "*may*" dismiss a complaint if he finds the complaint is "directly related to the merits of a decision or a procedural ruling." A finding of merits relation does not *prohibit* the chief judge from appointing a special committee and therefore does not undermine the validity of the action of the Special Committee or the Judicial Council for the purposes of § 372(c)(10). Had the Fifth Circuit Judicial Conference promulgated a rule specifically calling for the investigation of the merits of decisions, such a rule might conceivably be challenged under *Traynor,* 485 U.S. at 541-45 (allowing review of claim that an agency regulation was invalidated by a statute not committed to that agency's exclusive administration). But no such rule exists in this case, and Judge McBryde has stated his objection only in the most general terms. Nowhere does he suggest that the Judicial Council's action has the character of a rule, or suggest an exception under *Traynor,* or even suggest which statutory provision such a rule would run afoul of. Again, it is plain that the statutory error asserted (if error it be) is not the sort that under *Dart* would deprive the defendants' orders of the status of "orders and determinations" covered by § 372(c)(10), or otherwise escape its preclusive effect.

* * * * * *

Judge McBryde makes two related facial constitutional challenges that survive both mootness and preclusion. First, he reads the clause vesting the impeachment power in Congress as precluding *all* other methods of disciplining judges; on this theory, the Act violates separation of powers doctrine. Second, he says that the principle of judicial independence implicit in Article III bars discipline of judges for actions *in any way* connected to his actions while on the bench.

The issues are of course linked, as the great bulwarks of judicial independence are the guarantees of life tenure and undiminished salary during good behavior. For Judge McBryde, the fact that individual judges are the direct beneficiaries of these guarantees proves that it is the individual judge that is the relevant unit of judicial independence. While this perspective has had its supporters, see *Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 129-43 (1970) (Douglas, J., and Black, J., dissenting); *Hastings I,* 770 F.2d at 1106-07 (Edwards, J., concurring); but see Harry T. Edwards, *Regulating Judicial Misconduct and Divining "Good Behavior" for Federal Judges,* 87 MICH. L. REV. 765, 785 (1989), the cases speak almost exclusively to judicial independence from the influence or control of the legislative and executive branches. See *Mistretta v. United States,* 488 U.S. 361, 382 (1989) ("the Framers 'built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other.'") (quoting *Buckley v. Valeo,* 424 U.S. 1, 122 (1976)); *United States v. Will,* 449 U.S. 200, 217-18 (1980) ("[a] Judiciary free from control by the Executive and Legislature"); THE FEDERALIST No. 78 (Hamilton). After all, "Article III creates[ ] not a batch of unconnected courts, but a judicial *department* composed of 'inferior Courts' and 'one supreme Court.'" *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 227 (1995) (emphasis in original).

That individual judges are direct beneficiaries of the tenure and salary protections of Article III by itself hardly shows that the overarching purpose of these provisions was to insulate individual judges against the world as a whole (including the judicial branch itself), rather than, as the cases above indicate,

to safeguard the branch's independence from its two competitors. For support of his view Judge McBryde points to a footnote from *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), in which the Court said that the two guarantees "serve other institutional values as well," among them "insulat[ing] the individual judge from improper influences not only by other branches but by colleagues as well." *Id.* at 59 n.10. But the primary value the Court asserted was "to ensure the independence of the Judiciary from the control of the Executive and Legislative Branches of government." *Northern Pipeline,* 458 U.S. at 59. The conclusion that other values are also in play is a far cry from Judge McBryde's argument that the individual judge must be constitutionally sheltered not merely from removal and salary diminution but also from lesser sanctions of every sort. Lesser sanctions are common, as the Court has noted:

> Many courts . . . have informal, unpublished rules which . . . provide that when a judge has a given number of cases under submission, he will not be assigned more cases until opinions and orders issue on his 'backlog.' These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted.

Chandler, 398 U.S. at 85. As there is no basis for Judge McBryde's core assumption that judicial independence requires absolute freedom from such lesser sanctions, his two claims fall swiftly.

Judge McBryde frames his separation of powers claim as whether the Constitution "allocates the power to discipline federal judges and, if so, to which branches of government." App. Br. at 54. Finding that it allocates the power to Congress in the form of impeachment, he concludes that it excludes all other forms of discipline. But Judge McBryde's attempt to fudge the distinction between impeachment and discipline doesn't work. The Constitution limits judgments for impeachment to removal from office and disqualification to hold office. U.S. Const. art. I, § 3, cl. 7. It makes no mention of discipline generally. The Supreme Court recently observed that it accepted the proposition that "[w]hen a statute limits a thing to be done in a particular mode, it includes a negative of any other

mode." *Christensen v. Harris County,* 529 U.S. 576, 583 (2000) (internal citations omitted). But application of the maxim depends on the "thing to be done." Here the thing to be done by impeachment is removal and disqualification, not "discipline" of any sort.

The Constitution itself preserves criminal prosecution, see U.S. Const. art. I, § 3, cl. 7 ("the Party convicted shall nevertheless be liable and subject to Indictment, Trial, Judgment and Punishment, according to Law"), and at least three circuits have held that prosecution of judges can precede impeachment. See *United States v. Claiborne,* 727 F.2d 842, 845 (9th Cir. 1984); *United States v. Hastings,* 681 F.2d 706, 710 (11th Cir. 1982); *United States v. Isaacs,* 493 F.2d 1124, 1140-44 (7th Cir. 1974). Even Justices Douglas and Black, who dissented in *Chandler* from the Court's narrowly framed denial of relief for a district judge whose colleagues had limited his case assignments, acknowledged that judges were subject to criminal prosecution. See *Chandler,* 398 U.S. at 140 ("If they break a law, they can be prosecuted. If they become corrupt or sit in cases in which they have a personal or family stake, they can be impeached by Congress.") (Douglas, J., dissenting); *id.* at 141-42 ("[J]udges, like other people, can be tried, convicted, and punished for crimes.") (Black, J., dissenting).

Judge McBryde accepts that judges are subject to prosecution, but argues that impeachment nonetheless excludes discipline of judges *by* judges. In yet another attempt to prove his individualized idea of judicial independence, he points to Hamilton's statement in Federalist No. 79 that: "The precautions for [judges'] responsibility are comprised in the article respecting impeachments. . . . This is the only provision on the point, which is consistent with the necessary independence of the judicial character, and is the *only* one which we find in our own Constitution in respect to our own judges." THE FEDERALIST No. 79 at 532-33 (Hamilton) (Jacob E. Cooke, ed., 1961) (emphasis added). But even if we assume the remark embraces not merely removal and disqualification but lesser forms of discipline, it does not seem likely to have been aimed at intra-branch constraints. Hamilton's concern with judicial independence seems largely to have been directed at the threat

from the two other branches. "I agree that 'there is no liberty, if the power of judging be not separated from the legislative and executive powers.'" THE FEDERALIST No. 78 at 523 (Hamilton) (Jacob E. Cooke, ed.) (quoting Montesquieu). And he famously characterized the judiciary as "the least dangerous" branch. *Id.* at 522. Thus it seems natural to read Hamilton as seeing the guarantees of life tenure and undiminished compensation, and the limited means for denying a judge their protection, simply as assuring independence for the judiciary from the other branches. The Supreme Court has considered the same passage as Judge McBryde invokes and so interpreted it: "In our constitutional system, impeachment was designed to be the *only* check on the Judicial branch *by the Legislature*." *Nixon v. United States,* 506 U.S. 224, 235 (1993) (some emphasis added).

Indeed, the Hamiltonian concern for protecting the judiciary from other branches argues *for* internal disciplinary powers. Arrogance and bullying by individual judges expose the judicial branch to the citizens' justifiable contempt. The judiciary can only gain from being able to limit the occasions for such contempt. See *In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit,* 783 F.2d 1488, 1507-08 (11th Cir. 1986).

Judge McBryde invokes another element of constitutional history – the framers' consideration and rejection of the proposal to vest the impeachment power in the courts, or in some combination of judicial and legislative officers. But, as was true of the effort to find a negative implication in the Constitution itself, this tells us only what we already knew: that the framers lodged the powers of removal and disqualification solely in Congress, in the form of impeachment.

Judge McBryde acknowledges, as he must, that in other contexts the impeachment power does not exclude all intra-branch discipline. In *Myers v. United States,* 272 U.S. 52 (1926), the Supreme Court found (in the strongest form – against a contrary decision by Congress) that the President had power to *remove* civil officers, excluding judges, even though Congress would have been able to remove some of the same officers only through impeachment. While that power is not

absolute, its limitation does not depend on the exclusive power of Congress to impeach. See *Morrison v. Olson,* 487 U.S. 654, 691 (1988).

Judge McBryde would have us write off the Court's endorsement of executive branch discipline as peculiar to and dependent on the executive's hierarchical structure. But the question is the implication from the Constitution's vesting of impeachment power in Congress. The Constitution makes no distinction between judges and other officers. It provides only that "all civil Officers of the United States, shall be removed from Office on Impeachment." U.S. Const. art. II, § 4.

In short, the claim of implied negation from the impeachment power works well for removal or disqualification. But it works not at all for the reprimand sanction, which bears no resemblance to removal or disqualification and is the only sanction in the case that remains unmoot.[5] Thus Judge McBryde's textual argument fails. Given the benefits to the judiciary from intra-branch efforts to control the self-indulgence of individual judges, we see no basis for inferring structural limits on Congress's enabling such efforts.

Judge McBryde's second facial claim is that the Constitution, even assuming it does not altogether bar intra-judicial sanctions (other than by appeal, mandamus, etc.), flatly bars any such sanction for "anything to do with anything that happened when the judge . . . was acting and deciding cases or in any phase of the decisional function." Oral Arg. Tr. at 17-18. His counsel was quite explicit that this would include a judge's nakedly racist disparagement of counsel, *id.* at 9, indeed, "anything that the judge does verbally or physically in the course of adjudication," *id.* at 8. Asked whether this would include punching counsel, Judge McBryde's counsel suggested that criminal proceedings at state law would supply an ample remedy. *Id.* at 9.

It may help put Judge McBryde's theory in perspective to look at one of the many episodes that led to the present sanctions. In 1992, Judge McBryde sanctioned a lawyer appearing before him

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[5] Obviously, we do not decide whether a long-term disqualification from cases could, by its practical effect, affect an unconstitutional "removal."

for failing to have her client attend a settlement conference in violation of Judge McBryde's standard pretrial order, which required all principals to attend the conferences. Counsel represented a corporation and its employee, defendants in a suit in which plaintiffs, a woman and her 10-year old daughter, had alleged sexual harassment. One of the allegations was that the individual defendant "had terrorized the 10-year old . . . by popping out his glass eye and putting it in his mouth in front of her." *Committee Report* at 19. The lawyer thought the presence of the individual defendant would be counter-productive to settlement efforts; the individual had no assets and had given her full authority to settle. See *id.* at 20.

After chastising the lawyer, Judge McBryde required that she attend a reading comprehension course and submit an affidavit swearing to her compliance. See *id.* at 20. The attorney submitted an affidavit attesting to the fact that she found a course and attended for three hours a week for five weeks. Judge McBryde challenged her veracity and required that she submit a supplemental affidavit "listing 'each day that she was in personal attendance at a reading comprehension course in compliance with [the] court's order; the place where she was in attendance on each date; the course title of each course; how long she was in attendance on each day; and the name of a person who can verify her attendance for each day listed.'" *Id.* at 22. She complied. The Special Committee characterized this incident as reflecting a "gross abuse of power and a complete lack of empathy." *Id.* at 18. Judge McBryde tells us that the defendants unconstitutionally impugn judicial independence when they express a formal, institutional condemnation of this sort.

We assume arguendo that the procedures of the Act may not constitutionally be used as a substitute for appeal. But Judge McBryde's theory plainly goes well beyond judicial acts realistically susceptible of correction through the avenues of appeal, mandamus, etc. Appeal is a most improbable avenue of redress for someone like the hapless counsel bludgeoned into taking reading comprehension courses and into filing demeaning affidavits, all completely marginal to the case on which she was working. Possibly she could have secured review by

defying his orders, risking contempt and prison. But we are all at a loss to see why those should be the only remedies, why the Constitution, in the name of "judicial independence," can be seen as condemning the judiciary to silence in the face of such conduct. Counsel punched out by the judge could not even pursue a remedy by risking contempt, of course, since the punch involves no judicial order that he could disobey.

> The Court said in *Chandler,* in dictum to be sure:
>
> There can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function. But it is quite another matter to say that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business.

398 U.S. at 84. As we noted above, we see nothing in the Constitution requiring us to view the individual Article III judge as an absolute monarch, restrained only by the risk of appeal, mandamus and like writs, the criminal law, or impeachment itself. We thus reject Judge McBryde's facial constitutional claims.

* * * * * *

The process of construing § 372(c)(10) led us to raise and answer the question whether the Review Committee was authorized to entertain Judge McBryde's constitutional as applied challenges, and we concluded that it was. The Committee, as we noted, has given a contrary answer. As we read § 372(c)(10) to deny us the authority to review any aspect of the decisions about Judge McBryde other than the facial constitutional claims, we have no authority to mandate the Committee's consideration of the as applied claims. We believe, nonetheless, that the Review Committee should reconsider its view in light of our opinion and we therefore request it to do so.

* * * * * *

Accordingly, the judgment of the district court as to the one-year and three- year suspensions is *vacated* and the judgment as to the reprimand is *affirmed*.

So ordered.

TATEL, *Circuit Judge*, concurring in part and dissenting in part:

I agree with the court in many respects: that Judge McBryde's challenge to the reprimand is not moot; that the Judicial Councils Reform and Judicial Conduct and Disability Act of 1980 is not facially unconstitutional; and that the Act bars us from reviewing Judge McBryde's statutory claims. I do not agree, however, that the Act precludes us from reviewing Judge McBryde's as-applied constitutional claims. I would therefore have reached those claims and, because I think one claim has merit, reversed the district court and directed that the matter be remanded to the Fifth Circuit Judicial Council for further proceedings. Although the Council's Report finds that Judge McBryde engaged in some clearly egregious and sanctionable conduct, the Report also describes judicial conduct that was either less clearly abusive or apparently quite appropriate, and the Report never adequately explains how – or even in some instances whether – such behavior rises to the level of a clear abuse of judicial power. The Report thus leaves open the possibility that Judge McBryde was sanctioned in part for behavior that was not at all abusive. In addition, because the Report is imprecise and leaves much conduct unexplained, using the Report as a basis for sanctions risks chilling other district judges' ability to manage their courtrooms effectively. I thus believe that the Council's actions amounted to an unconstitutional infringement of judicial independence.

I

This case has its origins in a prior dispute between Judge McBryde and his colleagues over certain case assignments. In late April and early May of 1995, Chief Judge Buchmeyer of the Northern District of Texas reassigned two cases, *United States v. Satz,* No. 4:94-CR-094-R (N.D. Tex.) and *Torres v. Trinity Industries, Inc.*, No. CA4-90-812-A (N.D. Tex.), from Judge McBryde to himself. The reassignments responded to Judge McBryde's allegedly "unwarranted" and "abusive" treatment of attorneys and court personnel. *See In re John H. McBryde,* 117 F.3d 208, 215-18 (5th Cir. 1997). In *Satz,* Judge McBryde had found an Assistant United States Attorney in contempt of court for, among other things, stating that a sealing order in a related federal case prevented her from answering certain of Judge McBryde's questions. Judge McBryde believed, erroneously as it turned out, that no such order existed. *Id.* at 213. *Torres* involved correspondence between Judge McBryde and the clerk of the court over an administrative error that had resulted in a court-approved settlement not being implemented. Judge McBryde wrote that a letter from the clerk had been "so unprofessional and so disrespectful . . . that it borders on, if it does not constitute, contempt of court." *Id.* at 215.

After Chief Judge Buchmeyer reassigned the two cases, Judge McBryde filed a Request for Assistance with the Fifth Circuit Judicial Council. *Id.* at 217. Fifth Circuit Chief Judge Politz referred the matter to a Special Investigatory Committee composed of himself, two fellow circuit judges, and two district judges. *Id.* Following several days of hearings, the Special Committee, relying on section 332 of the Act, upheld the reassignment, finding that "Judge McBryde's conduct in both cases was unwarranted." *Id.* Judge McBryde's attack on the AUSA and a second government official involved in *Satz* "and his accusations against them of lying and contempt of court," the Committee concluded, "were baseless, threatening irreparable damage to [their] professional reputations and careers." *Id.* His attack on the clerk of the court was likewise "unwarranted [and] abusive, and threatened to damage [her] professional reputation." *Id.*

Almost two years later, the Fifth Circuit vacated the reassignment order. According to the court, the Council had no author-

ity "to censure a judge under [section] 332" of the Act or to "order a case reassigned based on its disagreement with the district judge's factual findings." *McBryde,* 117 F.3d at 229. In reaching its conclusion, the court noted that "finders of fact could reasonably defend either side" of the dispute, stating explicitly that Judge McBryde "could piece together a number of facts that pointed to the larger conclusion that [the AUSA involved in the *Satz* case] was lying," that the Judge "delivered a cogent statement of his reasons for rejecting [the AUSA's] reliance on a broad sealing order," that "[w]e need not attribute paranoia or irrationality to Judge McBryde to explain his view that [the AUSA's] contentions about the sealing order were untruthful," and that "Judge McBryde's understanding of the factual basis for suspecting that [the court clerk in *Torres*] was on the verge of contempt was similarly within the bounds of reason." *Id.* at 218-19.

Meanwhile, shortly after Judge McBryde had requested the Judicial Council's assistance and long before the Fifth Circuit vacated the Special Committee's reassignment decision, Chief Judge Politz referred two complaints of misconduct against Judge McBryde (one of which involved the Judge's conduct in *Satz*) to the Special Committee, with directions to investigate and report on them. *Report of the Special Committee of the Fifth Circuit Judicial Council Regarding Complaints Against, and the Investigation into the Conduct of, Judge John H. McBryde* at 1 (Dec. 4, 1997). According to the Committee's eventual Report, Committee members were from the outset "concerned about two things: first, that Judge McBryde [might] have a health problem (physical or mental) which affect[ed] his activities as a judge, and second, that Judge McBryde ha[d] engaged in a pattern of abusive behavior as a federal judge." *Id.* at 3.

Pursuing its suspicions that Judge McBryde might suffer from a psychiatric disorder, the Committee submitted certain materials concerning Judge McBryde to two psychiatrists, asking the doctors whether a psychiatric examination of the Judge was warranted. Report at 3. When both doctors answered yes, the Council engaged in a series of ultimately unsuccessful efforts to get Judge McBryde to undergo such an examination. *Id.* In the

meantime, the Special Committee learned about "more and more instances of allegations of repetitive, abusive and excessive conduct by Judge McBryde beyond the allegations in the . . . complaints." *Id.* at 8. Therefore, invoking section 372(c)(5) of the statute, the Special Committee "decided to broaden its investigation" to encompass incidents from throughout Judge McBryde's judicial career. *Id.* In August, September, and October of 1997, the Committee held nine days of evidentiary hearings in New Orleans and Fort Worth. *Id.* at 9. Fifty-five witnesses testified, including federal district court judges, a state court judge, government and private attorneys who had practiced before or had contact with Judge McBryde, court personnel, former jurors who had served in Judge McBryde's courtroom, and current and former members of the Judge's staff. *Id.* at 9-10.

Based on this evidence, the Committee prepared a Report, the bulk of which set forth details concerning twenty-two separate incidents involving Judge McBryde's dealings with lawyers, fellow judges, a state judge, and the clerk of the court. Report at 10-107. Although these include some obviously abusive and serious incidents, *see, e.g.,* Maj. Op. at 67-68, the Report also includes several incidents that appear to be relatively trivial examples of a judge controlling a trial or of friction among judicial colleagues. For example, the Report describes an incident in which Judge McBryde, responding to defense counsel's claim that a prosecutor should have disclosed certain financial schedules, accused the prosecutor of adopting "a sort of cat-and-mouse approach to discovery." Report at 50. The judge neither dwelled on the matter nor imposed sanctions. *Id.* In another incident (that occurred in a parking lot), Judge McBryde became angry and lashed out at a fellow judge who had joked about the Judge's impatience. *Id.* at 101-03. On still another occasion (at a judges' meeting), Judge McBryde called two fellow judges "despicable." *Id.* at 103-04. Similar incidents appear throughout the Report: Judge McBryde was "not always solicitous of his fellow judges' needs or feelings" with respect to use of courtrooms, *id.* at 106; on learning that the lead public defender on a case was engaged in another courtroom, Judge McBryde attempted to proceed with the case "[r]ather

than calling another matter on the docket," *id.* at 24; in a private, one-on-one meeting with the Federal Public Defender, Judge McBryde stated that he was "concerned" about the relationship between public defenders and U.S. Attorneys, indicating that he "suspected" that defenders and U.S. Attorneys were engaged in a "'collusive effort' to subvert the Sentencing Guidelines," *id.* at 42.

The Report describes other conduct that, though apparently more abusive, might nonetheless be entirely appropriate under certain circumstances. For example, the Report recounts several instances in which Judge McBryde accused attorneys of bad faith, sometimes sanctioning them and sometimes not. *See, e.g.*, Report at 10-15, 15-18, 36-42. The Report also mentions two occasions on which Judge McBryde criticized an entire office. *See id.* at 17-18 ("I have perceived on more than one occasion recently that members of the Federal Public Defender's Office are less than candid with the court."); *id.* at 38 ("I just have the feeling that the Civil Section of the U.S. Attorney's office here in Fort Worth is not always candid with the Court. . . .").

The Report also examines Judge McBryde's trial rules and enforcement techniques. According to the Report, the Judge uses strict trial rules, including "the requirement that parties enter into . . . stipulation[s] with respect to . . . every uncontested fact in [a] case," which are then "read seriatim to the jury at the beginning of the case and may not be referred to again later in the proceeding," and a "prohibition on asking questions on cross-examination similar to questions asked of [witnesses] on direct examination." Report at 107-08. Quoting from transcripts in two cases, the Report states that "Judge McBryde's manner of enforcing his rules is harsh and often humiliating." *Id.* at 110. The Report describes the testimony of several witnesses who stated that the combination of Judge McBryde's rules and his manner of enforcing them creates an "oppressive and intimidating atmosphere that pervades Judge McBryde's courtroom," *id.* at 116, and has a "chilling effect" on these lawyers' ability to present their cases effectively, *id.* at 121. This kind of enforcement, the Report says, formed a "pattern" that had not changed despite appellate criticism. *Id.* at 122. Because of the chilling effect of Judge McBryde's rules and his

manner of enforcement, the Report concludes that attorneys, fearing humiliation or embarrassment, forego actions they believe are in their clients' best interests and fail to preserve issues for appeal. These problems, the Report notes, are difficult to correct through the appellate process. *Id.* at 121-22.

The Report acknowledges that some of Judge McBryde's former staff testified that he was "cordial and considerate in his dealings with them," and that several lawyers who testified on the Judge's behalf stated that he "prepares thoroughly, addresses motions promptly, . . . writes scholarly opinions on difficult legal questions," and moves cases through his docket expeditiously. Report at 123-24. Although acknowledging that these witnesses were comfortable practicing in front of Judge McBryde and thought that he was fair, *id.* at 113-15, the Committee concluded that just because "it is possible for some attorneys . . . to adapt to Judge McBryde's rules is not a vindication of these rules. The weight of evidence presented during the hearings convinces the Committee that Judge McBryde imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner." *Id.* at 115-16.

Based on all of this evidence, the Report concludes (1) that "many of these individual instances, together with the patterns demonstrated over the years surveyed," indicate that Judge McBryde had "engaged in conduct prejudicial to the effective administration of the business of the courts," and (2) that Judge McBryde's "pattern of abusive behavior . . . has brought disrepute upon the federal judiciary." Report at 150. The Report recommends that the Council ask Judge McBryde to resign, and if he refused, that it impose the three sanctions – a reprimand and two suspensions – described in the court's opinion. Maj. Op. at 54-55. The recommended reprimand states that Judge McBryde's "intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others ha[d] detrimentally affected the effective administration of justice . . . in the Northern District of Texas," and that Judge McBryde had "abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel," thus having a "negative and chilling impact on the Fort Worth legal

community," among other things "preventing lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system" and "harm[ing] the reputation of the court." Report at 154.

Invoking section 372(c)(6) of the Act, the Council imposed the three recommended sanctions. Six of the nineteen Council members voted against imposing the one-year suspension; two voted against the public reprimand; one voted against the three-year recusal. Order of the Judicial Council of the Fifth Circuit at 1, *In re John H. McBryde* (Jan. 7, 1998) (No. 95-05-372-0023).

Pursuant to the Act, Judge McBryde petitioned the Review Committee of the Judicial Conference for review of the Council's order. Granting "substantial deference" to the Judicial Council's findings of fact, Memorandum and Order of the Judicial Conference of the United States at 6, *In re Complaints of Judicial Misconduct or Disability* (Sept. 18, 1998) (No. 98-372-001), and expressly declining to review any of Judge McBryde's constitutional claims, *id.* at 21, the Review Committee rejected the Judge's remaining procedural and substantive complaints. Finding the one-year suspension justified as a remedial, rather than a punitive, measure, the Review Committee revised the Council's sanction in one respect: it ordered the suspension terminated if Judge McBryde demonstrates that he had "seized the opportunity for self-appraisal and deep reflection in good faith and . . . made substantial progress toward improving his conduct." *Id.* at 27.

II

My main disagreement with the court centers on section 372(c)(10)'s last sentence – the Act's review preclusion clause. Unlike my colleagues, I do not believe that this clause prevents us from reaching Judge McBryde's as-applied constitutional claims.

As the court points out, under both Supreme Court and D.C. Circuit precedent, we construe review preclusion clauses to prevent review of constitutional claims only when we find "clear and convincing" evidence of congressional intent to do

so. Maj. Op. at 59. Even outside the constitutional context, a "general presumption favor[s] judicial review in the absence of 'clear and convincing evidence of a contrary legislative intent.'" *Griffith v. Fed. Labor Relations Auth.*, 842 F.2d 487, 490 (D.C. Cir. 1988) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)). "The maxim that congressional preclusion of judicial review must be 'clear and convincing' applies in a particularly rigorous fashion . . . when constitutional claims are at stake." *Id.* at 494. As we said in *Ungar v. Smith*, "[w]hen . . . [a] plaintiff seeks to invoke the aid of the judicial branch on constitutional grounds, the Supreme Court and this court have both indicated that only the clearest evocation of congressional intent to proscribe judicial review of constitutional claims will suffice to overcome the presumption that the Congress would not wish to court the constitutional dangers inherent in denying a forum in which to argue that government action has injured interests that are protected by the Constitution." 667 F.2d 188, 193 (D.C. Cir. 1981). *See also Webster v. Doe*, 486 U.S. 592, 603 (1988) ("We require this heightened showing in part to avoid the 'serious constitutional question' that would arise if a federal statute were construed to deny any judicial forum for a colorable constitutional claim.") (quoting *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 681 n.12 (1986)).

In my view, the requisite "clear and convincing" evidence of intent is absent here. As my colleagues acknowledge, section 372(c)(10) contains no language expressly barring constitutional challenges. *See* Maj. Op. at 59-60. Indeed, Congress knows how to preclude review of constitutional claims when it wants to. For example, the federal statute governing deportation and denaturalization provides that "[j]udicial review of all questions of law and fact, *including interpretation and application of constitutional and statutory provisions*, . . . shall be available only in judicial review of a final order under this section." 8 U.S.C. § 1252(b)(9) (emphasis added).

In *Ungar* as well as in *Ralpho v. Bell*, we found statutes containing language just as preclusive as section 372(c)(10)'s insufficient to bar review of as-applied constitutional claims. The statute in *Ungar* provided that administrative decisions are "final" and "not . . . subject to review by any court." 667 F.2d

at 193 (internal quotation marks omitted). In *Ralpho,* the statute provided that "[administrative decisions] shall be final and conclusive for all purposes, notwithstanding any other provision of law to the contrary[,] and not subject to review." 569 F.2d 607, 613 (1977). Using equally preclusive language, section 372(c)(10) provides that "[a]ll orders and determinations [of the Judicial Conference] . . . shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." 28 U.S.C. § 372(c)(10).

As my colleagues also note, *see* Maj. Op. at 59-60, absent express statutory language, our prior opinions have "studied the legislative history" in search of a "clear expression of Congress's desire to prevent the courts from passing upon . . . constitutional claims," *Ungar,* 667 F.2d at 196, or an "affirmative statement addressed to preclusion of *constitutional* claims." *Griffith,* 842 F.2d at 494. Here, as in *Ralpho, Ungar,* and *Griffith,* the legislative history includes no direct comment at all about whether the Act's review preclusion language was meant to cover constitutional challenges. *See* Maj. Op. at 59-60 ("Of course if the [*Griffith*] trilogy is read to require magic words expressly barring as applied constitutional attacks, they are not to be found.").

Lacking a clear affirmative statement in the statute's text or legislative history, my colleagues infer from the defunct Senate version of the Act and its accompanying legislative history that Congress intended the preclusion clause to cover as-applied constitutional challenges. *See* Maj. Op. at 59-63. Although this is certainly a plausible interpretation of the legislative history, both *Griffith* and *Ungar* declined to treat such inferences from prior versions of bills as sufficiently clear evidence of congressional intent to preclude judicial review of as-applied claims. In *Griffith,* the original Senate bill provided that most decisions of the Federal Labor Relations Authority would be "final and conclusive" and not subject to further judicial review, but provided an exception for "questions arising under the Constitution." 842 F.2d at 495. The conference committee, rejecting the House's proposal for expansive judicial review and generally adopting the Senate's more restrictive approach, dropped "without explanation" the exception for constitutional questions.

Id. Nevertheless, observing that circuit precedent required an "affirmative statement addressed to preclusion of *constitutional* claims," *id.* at 494, we held that "[t]his silent deletion [was] not enough, under our cases, to support an inference of intent to precludeconstitutional claims." *Id.*

The statute at issue in *Ungar* provided that Justice Department decisions regarding claims for the return of assets vested in the Office of Alien Property were not subject to judicial review. Deciding that this provision did not preclude review of as-applied constitutional claims, we noted that "[a]n earlier version of the bill . . . included an elaborate scheme for trial of just-compensation claims in the Court of Claims," which was "deleted on the House floor for reasons that are not wholly plain." We were nonetheless "not willing to regard this as clear evidence of Congressional intent. . . ." 667 F.2d at 195 n.2.

The evidence of legislative intent to preclude judicial review that we declined to credit in *Griffith* and *Ungar* was, if anything, stronger than in this case. In those cases, we found legislative history insufficiently clear and convincing to preclude as-applied challenges even though the original versions of the statutes at issue allowed review of constitutional questions, while the final versions eliminated such provisions, suggesting a movement *toward* precluding such review. Here, by contrast, the legislative history suggests movement *away* from preclusion. Senator DeConcini, one of the Act's primary sponsors, introduced a Report prepared by Johnny H. Killian, an American law specialist at the Library of Congress, suggesting that under Supreme Court precedent, Congress can safely preclude judicial review of constitutional claims so long as "litigants at some point [have] access to an Article III court." 125 CONG. REC. 30,050 (1979) (statement of Sen. DeConcini). Senator DeConcini's bill provided for review of disciplinary decisions by a newly created, five-judge Article III Court of Judicial Conduct and Disability. *Id.* Later House revisions shifted review from the five-judge court to the Judicial Conference. In doing so, the House Judiciary Committee emphasized that it was moving from a "court" to an "administrative model." *Compare* H.R. REP. No. 96-1313, at 4 (1980) ("[R]ather than creat[ing] luxurious mechanisms such as special courts and commissions

– with all the trappings of the adversary process, including legal counsel, written transcripts, discovery and cross examination – the [House version of the bill] emphasize[s] placing primary administrative responsibility within the judicial branch of government.") *with id.* at 14 (stating that this "legislation creates much more of an 'inquisitorial-administrative' model than an 'accusatorial-adversary' one"). When the Act returned to the Senate, Senator DeConcini made the same point, explaining to his colleagues that the Judicial Conference, unlike the five-judge court proposed in the Senate version of the bill, was "not an independent review court." 126 CONG. REC. 28,090 (1980) (statement of Sen. DeConcini, quoting the Killian Report); *see also Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 86 n.7 ("[T]he Judicial Council was intended to be . . . an administrative body functioning in a very limited area in a narrow sense as a 'board of directors' for the circuit."). Because Congress had been informed by the Killian Report that it could safely preclude review of constitutional questions only if such review was available in an Article III court, and because it had also been advised by both Senator DeConcini and the House Judiciary Committee that the Judicial Conference was not an Article III court, Congress would have understood that vesting power to review disciplinary decisions in the Judicial Conference opened those decisions to constitutional attack in the federal courts.

Under all of these circumstances, I do not see how the evidence of Congress's intent to preclude as-applied constitutional challenges can be considered clear and convincing – or, as we required of legislative history in *Griffith,* "unusually clear." 842 F.2d at 494. Not only did both *Griffith* and *Ungar* find similar inferences from legislative history insufficient to meet the clear and convincing standard, but in this case, there is an equally plausible – if not more plausible – interpretation of the legislative history that suggests Congress did *not* intend to preclude review of as-applied constitutional challenges.

My colleagues' observation about "substantial redundancy" between review performed by the Judicial Conference and Article III courts, *see* Maj. Op. at 62-63, is interesting, but I think not dispositive. For one thing, while it is true that the two

forms of review are both performed by Article III judges, I do not agree that they are entirely redundant: decisions of Article III courts are reviewable on certiorari by the Supreme Court, a distinction of particular importance given the constitutional interests at stake here. Even assuming they were identical, moreover, such functional redundancy would be convincing evidence of Congressional intent only if it were the sole form of evidence available, and it isn't. In view of Senator DeConcini's statement and the House Judiciary Committee Report, Congress most likely thought shifting review from an Article III court to the Judicial Conference opened decisions of the latter to as-applied constitutional challenges in the federal courts. In my view, this primary evidence of legislative intent outweighs any inferences that might be drawn from whatever functional redundancy may exist.

Finally, my colleagues believe that preclusion of constitutional claims would serve the statutory purpose of "prevent[ing] undue prolongation of the disciplinary process." Maj. Op. at 62-63. But we have twice found review preclusion statutes designed to accomplish similar goals insufficient to establish clear congressional intent to bar review of as applied constitutional claims. *See Griffith*, 842 F.2d at 495 (Congress's scheme to limit judicial review of FLRA decisions was meant to promote "finality, speed[,] and economy," and thus barred district court review of FLRA decisions on statutory grounds, but review of as-applied constitutional claims nonetheless was not precluded); *Ungar*, 667 F.2d at 195-96 (legislative history indicating that review preclusion provision was "intended to reduce . . . delay in adjudicating claims under the Trading with the Enemy Act" was not a "clear expression of Congress's desire to prevent the courts from passing upon . . . constitutional claims").

III

Having found no "clear and convincing" evidence that Congress intended to preclude review of as-applied constitutional challenges to judicial council sanctions, I would have considered the merits of Judge McBryde's as-applied claims.

In addition to the challenges discussed by the court, *see* Maj. Op. at 64-68, Judge McBryde raises the question whether the Judicial Council unconstitutionally interfered with his judicial independence by punishing him because it disagrees with his judicial philosophy and acts: "Purportedly pursuant to the Act, defendants investigated Judge McBryde's performance of his judicial functions, requiring him to defend his performance and disrupting his judicial activities. They then punished him, and changed his judicial status, because they disapproved of his judicial performance, depriving him of all new cases for one year . . . and issuing a damning public reprimand. Does the Act violate the judicial independence doctrine of Article III on its face and as applied?" Appellant's Opening Br. at 2. Answering this question, Judge McBryde argues that "the Constitution does not allow agencies to supervise his judging, disagree with his rulings, and punish him because his rulings do not meet some 'norm' of acceptable judicial conduct." *Id.* at 52-53. The Judicial Conference disagrees: "Given the conduct engaged in and the adverse effects on the judicial system in Fort Worth, Texas, that conduct had, Appellees submit that it was not unconstitutional to suspend assignment of new cases for up to one year for [the Judge] to reflect and to change his conduct." Appellees' Br. at 68-69.

I agree with my colleagues that the principle of judicial independence does not "constitutionally shelter[ ]" Judge McBryde from "sanctions of every sort." Maj. Op. at 65. I also agree that the creation of a mechanism enabling Judicial Councils to sanction judges for things that happened when they were "acting and deciding cases" or engaged in some other "phase of the decisional function" does not render the Act facially unconstitutional. *Cf. Chandler*, 398 U.S. at 85 ("Many courts – including federal courts – have informal, unpublished rules. . . . These are reasonable, proper, and necessary rules, and the need for enforcement cannot reasonably be doubted. [I]f one judge in any system refuses to abide by such reasonable procedures, it can hardly be that the extraordinary machinery of impeachment is the only recourse."). For reasons I will explain, however, I do believe that the principle of judicial independence permits sanctions to be imposed only for conduct that is *clearly*

abusive or *clearly* prejudicial to the adversarial process, and in this case, I think that Judge McBryde's conduct, as described in the Council's Report, does not uniformly meet this standard.

As an initial matter, I believe the principle of judicial independence guarantees to individual Article III judges a degree of protection against interference with their exercise of judicial power, including interference by fellow judges. As my colleagues note, the Supreme Court expressly stated in *Northern Pipeline* that the constitutional guarantee of life tenure "insulates the individual judge from improper influences not only by other branches but by colleagues as well, and thus promotes judicial individualism." *Northern Pipeline Constr. Co.* v. *Marathon Pipe Line Co.*, 458 U.S. 50, 59 n.10 (1982). Similarly, in *Chandler*, a case involving intrajudicial discipline, the Supreme Court stated that "[t]here can, of course, be no disagreement among us as to the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." 398 U.S. at 84. *See also In re Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit*, 783 F.2d 1488, 1506-07 (11th Cir. 1986) (noting, in the context of adjudicating the facial constitutionality of certain provisions of the Act, that "the majority [in *Chandler*] located a judge's protected independence . . . 'in deciding cases or in any phase of the decisional function,'" and then framing its basic inquiry as "whether [the] direct or indirect effects . . . the Act may have on an individual judge's independence are within proper tolerances").

The notion that individual judges enjoy a sphere of protected independence finds support in the cases establishing that judges cannot be held liable for damages arising out of performance of their judicial duties. "[I]t is a general principle of the highest importance to the proper administration of justice," the Supreme Court stated in *Bradley v. Fisher,* "that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge, would be inconsistent with the possession of this freedom, and would

destroy that independence without which no judiciary can be either respectable or useful." 80 U.S. (13 Wall.) 335, 347 (1871). Similarly, in *Pierson v. Ray*, the Court stated that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction.... This immunity applies even when the judge is accused of acting maliciously and corruptly, and it is not for the protection or benefit of a malicious or corrupt judge, but for the benefit of the public, whose interest it is that the judges should be at liberty to exercise their functions with independence and without fear of consequences." 386 U.S. 547, 553-54 (1967). *Cf. Quercia v. United States*, 289 U.S. 466, 469 (1933) ("Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts.").

Of particular relevance to this case, I believe the sphere of individual judicial independence – the protected "decisional function," as *Chandler* puts it, 398 U.S. at 84 – includes not only judges' freedom to reach their own conclusions about questions of fact and law, but also a margin of discretion to manage and control the adversarial process within their courtrooms. "Courts of justice," the Supreme Court has explained, "are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum, in their presence, and submission to their lawful mandates. These powers are governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (internal citations and quotations omitted). And as we have recognized, the exercise of this power requires that "a district judge ha[ve] wide discretion in monitoring the flow of a criminal trial. It is well within her discretion to rebuke an attorney, sometimes harshly, when that attorney asks inappropriate questions, ignores the court's instructions, or otherwise engages in improper or delaying behavior. . . . There is a 'modicum of quick temper that must be allowed even judges.'"

United States v. Donato, 99 F.3d 426, 434 (D.C. Cir. 1997) (quoting *Offutt v. United States*, 348 U.S. 11, 17 (1954)).

A judge's authority to control the courtroom is essential to the exercise of judicial power. Unlike legislative and executive power, the judicial power created by Article III can be exercised only on the basis of a factual record developed pursuant to established standards of relevance and authenticity. *See* FED. R. EVID. 402 (requiring that evidence be relevant to be admissible), 901 (requiring that evidence be authentic to be admissible). Critical to the development of a proper record is a well-functioning adversarial process in which lawyers serve both as zealous representatives of their clients and as officers of the court with responsibilities for fairness and disclosure that transcend their clients' interests. Unless judges can manage this process, if necessary by using both formal and informal disciplinary measures to ensure that lawyers perform their dual functions effectively and in accordance with established rules of practice and procedure, they may lack the fully developed record needed to exercise their judicial authority.

Judges' power to control the adversarial process, of course, is not absolute. Inappropriate trial management, for example, can undermine a trial's fairness. *See, e.g., Offutt*, 348 U.S. at 17 (explaining that trial judge's becoming personally embroiled with defense counsel compromised the court's "atmosphere of austerity" that is "consonant with a fair trial"); *Donato*, 99 F.3d at 430-31 (finding that judge's failure to provide counsel with bench conference outside the jury's presence violated Federal Rule of Criminal Procedure 30 and constituted prejudicial error); *Santa Maria v. Metro-North Commuter RR*, 81 F.3d 265, 273 (2d Cir. 1996) (finding that a trial judge's expressed antipathy toward and removal of trial counsel sufficiently prejudiced a defendant so as to require a new trial). A judge's abusive treatment of attorneys can prevent them from effectively defending their clients' interests. *See In re McConnell*, 370 U.S. 230, 236 (1962) ("While we appreciate the necessity for a judge to have the power to protect himself from actual obstruction in the courtroom . . . it is also essential to a fair administration of justice that lawyers be able to make honest good-faith efforts to present their clients' cases."). Abusive

treatment of lawyers can undermine the judiciary's reputation, threatening its integrity in the eyes of the public. *Cf. In re Certain Complaints,* 783 F.2d at 1507 ("The judiciary as a whole . . . has a interest in seeing that non-frivolous complaints are looked into, to the end that the judge, and the system he exemplifies, be exonerated or, if not that the public perceive that the system has undertaken to police itself, within constitutional limits, of course."); S. REP. No. 96-362, at 7 (1979), *reprinted in* 1980 U.S.C.C.A.N. 4315, 4321 ("The perception of a viable healthy judiciary is of critical importance to our system of justice."). As the Supreme Court has said, "an independent judiciary *and* a vigorous, independent bar are *both* indispensable parts of our system of justice." *McConnell,* 370 U.S. at 236 (emphasis added).

It is thus appropriate for Judicial Councils, acting pursuant to their general disciplinary power under section 372(c), to ensure that judges' trial management techniques do not interfere with the "effective and expeditious administration of the business of the courts." 28 U.S.C. § 372(c)(1). After all, Congress has authority to "limit[ ]" courts' inherent powers – including their power to manage trials – "by statute and rule, for these courts were created by act of Congress." *Chambers,* 501 U.S. at 47 (internal quotation marks omitted); *see, e.g., McConnell,* 370 U.S. at 233-34 (noting that Congress has limited courts' inherent powers to sanction attorney contempt by requiring such sanctions to be no more severe than necessary).

This does not mean that Congress may infringe – or authorize Judicial Councils to infringe – upon judges' trial management authority in any manner it sees fit. It is a familiar principle that even though Congress has the power to create lower federal courts and organize their functioning in certain respects, it can neither interfere with nor alter essential features of their operation. *See, e.g., Plaut v. Spendthrift Farm,* 514 U.S. 211, 240 (holding that Congress may not pass legislation that reopens final judgments of federal courts). Having vested authority to conduct trials in individual district judges, Congress cannot grant Judicial Councils the power to interfere with those judges' trial management authority to such an extent that judges cannot exercise it effectively. *Cf. In re Holloway,* 995 F.2d 1080, 1088

(D.C. Cir. 1993) (observing that absent a judge's ability to control a trial with enforceable sanctions, "trials would wander down every by-way, no matter how impermissible, in a sprawling chaos that would render the adjudication close to random. In the long run, such chaos is hardly in the interests of defendants as a whole, much less in the interest of society."). Congressional delegation of such authority would also violate the principle of separation of powers, which prevents not only the aggrandizement of one branch of government at the expense of another, but also the disruption by one branch of another's essential functions. *See Morrison v. Olson,* 487 U.S. 654, 675 (1988) (noting that "separation- of-powers concerns . . . would arise" if Congress's power to provide for interbranch appointments of inferior officers "had the potential to impair the constitutional functions assigned to one of the branches"); *Mistretta v. United States,* 488 U.S. 361, 404 (1989) (stating that the "ultimate inquiry" whether executive appointment of Article III judges to administrative posts violated separation of powers principles turned on whether the "particular extrajudicial assignment undermines the integrity of the Judicial Branch").

Thus, while I agree that in order to discourage the improper use of judicial power, protect the fairness of trials, and safeguard the integrity and reputation of the judiciary, it is appropriate to allow judicial councils to sanction judges for abusing their trial management power, I also believe that, to prevent such disciplinary action from encroaching upon legitimate and necessary uses of that power, such sanctions should be employed only for conduct that, viewed from the perspective of reasonable judges and lawyers, is *clearly* abusive toward counsel or *clearly* prejudicial to the adversarial process.

A rigorous standard of this kind is essential for several reasons. First, absent such a standard, judicial councils could more easily use their disciplinary authority to sanction non-abusive judicial behavior. Federal judges are not all alike: there are as many appropriate courtroom management techniques as there are judges. In any given situation, moreover, there will generally be more than one appropriate way to manage a trial or demand attorney compliance with court orders

and rules. One judge may use a light touch to get an aggressive lawyer to end an entirely inappropriate line of questioning; another judge may threaten sanctions. Allowing judges to punish each other absent evidence of clear abuse of counsel or clear damage to the adversarial process risks turning judicial discipline into a vehicle for sanctioning stylistic disagreements over trial techniques.

Second, some Judicial Council members, such as appellate judges, may have little or no experience dealing with aggressive trial lawyers who routinely test the limits of proper advocacy. To such judges, the trial management techniques needed to control these lawyers may seem harsh, even abusive. A rigorous standard that restricts sanctions to instances of clearly abusive behavior will reduce the likelihood that councils will sanction appropriate behavior out of inexperience. And quite apart from the problem of inexperience, even judges can act unfairly – indeed vindictively – towards colleagues. A rigorous standard will reduce, though of course it cannot eliminate, the possibility that judicial discipline will be used to sanction unpopular judges engaged in appropriate behavior.

Third, judicial discipline, like civil liability for judicial acts, can chill the proper exercise of judicial discretion. *See Pierson v. Ray,* 386 U.S. 547, 553-54 (1967) (holding that imposing civil liability for acts committed to judicial discretion "would contribute not to principled and fearless decisionmaking but to intimidation"); *cf. Williams v. United States,* 156 F.3d 86, 91-92 (1st Cir. 1998) ("If chastened attorneys can enlist appellate courts to act as some sort of civility police charged with enforcing an inherently undefinable standard of what constitutes appropriate judicial comment on attorney performance, trial judges are more likely to refrain from speaking and writing candidly. In our view, this chilling effect carries with it risks that are far greater than those associated with the evil of occasional overheated judicial commentary."). If judges can be sanctioned for conduct that is only arguably or possibly – as opposed to clearly – abusive, they may be reluctant to employ stern measures even when necessary to keep control of the adversarial process. This is especially true because a trial judge's harsh words or tough sanctions, entirely appropriate in

the heat of a tense and hard-fought trial, may seem abusive when viewed in retrospect through the pages of a cold record.

The possibility of chilling legitimate judicial behavior also means that, in cases like this one where judges are sanctioned in part for the effect their behavior has on lawyers who practice before them, judicial councils should apply an objective standard, asking not just what complaining lawyers felt, but also how the judge's conduct would have affected *reasonable* lawyers under similar circumstances. It is only natural for lawyers to feel slightly constrained and irritated when judges try to control them. If judicial councils fail to apply an objective standard when evaluating lawyer reactions and complaints, judges might fear discipline if enough disgruntled lawyers file complaints or testify against them. Judges might thus calibrate courtroom discipline to avoid displeasing lawyers, refraining from strict measures even when necessary and appropriate.

Finally, we have previously adopted a rigorous standard where, as here, sanctions could damage an individual's reputation. In *Shepherd v. ABC,* we held that courts cannot impose discovery sanctions based on attorney misconduct without clear and convincing evidence of the predicate wrongdoing. 62 F.3d 1469, 1476-78 (D.C. Cir. 1995); *see also Addington v. Texas,* 441 U.S. 418, 424 (1979) (stating that reputational interests "are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof"). If, because of the risk of imposing reputational harm, Article III courts must apply a heightened standard when sanctioning lawyers, a similar obligation should apply to judicial councils when considering disciplining fellow judges. Suspensions and, in particular, reprimands can cast long-lasting shadows over a judge's career.

I recognize that under a heightened standard, some abusive judicial conduct may be unsanctionable. Confining the disciplinary process to clear abuses of judicial power, however, would not eliminate all means of dealing with less abusive conduct. Judges address such conduct informally and collegially, and the President and Senate try to ensure that judicial nominees possess the appropriate temperament to serve as

life-tenured federal judges. Although such efforts may be imperfect, it seems far wiser to tolerate some inappropriate judicial conduct than to risk chilling appropriate judicial conduct throughout the federal judiciary.

With these principles in mind, I return to the facts of this case.

IV

Several incidents described in the Council's Report, such as the episode my colleagues recount, *e.g.*, Maj. Op. at 67-68, are so extreme and clearly abusive that, as the Special Committee concludes in one instance, they speak for themselves. *See* Report at 23 ("No more need be said with regard to this incident."); *see also, e.g., id.* at 26-30 (describing Judge McBryde's sanctioning the entire Federal Public Defender's Office because a single attorney could not be reached for forty-five minutes due to a misunderstanding); *id.* at 51-55 (describing Judge McBryde's berating an Assistant United States Attorney and holding him in contempt of court because a secretary had trouble connecting all of the parties to a conference call); *id.* at 55-59 (describing Judge McBryde's jailing an Assistant Public Defender who refused to answer a question he believed might compromise attorney-client privilege); *id.* at 60-65 (describing Judge McBryde's removing a state court judge from Judge McBryde's chambers without inquiring why the state court judge was there). Had the Council restricted its report to incidents like these, I would have no trouble rejecting Judge McBryde's as- applied challenge, for no reasonable judge would think behavior like this appropriate.

Not all of the conduct described in the Report, however, falls so clearly outside the bounds of appropriate judicial behavior. The Report's main deficiency is that it never adequately explains how such apparently less abusive conduct – ranging from the "cat-and-mouse" comment to accusations of lawyer bad faith to Judge McBryde's trial practice rules – amounts to a clear abuse, or in some instances even an abuse at all, of judicial power. The Report itself acknowledges that at least one incident was "fairly trivial," but suggests that "along with other incidents" it was "illustrative of a pattern of conduct." *Id.* at 23.

I recognize that trivial conduct that would not be abusive if it happened once might become so if repeated consistently over time. I also understand that intra-judicial discipline may be an important means of addressing patterns of behavior that cannot be corrected through informal mechanisms or appellate review. *See id.* at 122; Carol Rieger, *The Judicial Councils Reform and Judicial Conduct and Disability Act: Will Judges Judge Judges?*, 37 EMORY L.J. 45, 78-80 (1988). That said, it is not at all clear to me that the more trivial incidents the Report describes, even if they occurred persistently, amounted to abuses of judicial power. For example, I think it not at all obvious that a judge who consistently employed phrases like "cat-and-mouse approach to discovery," had difficult relations with colleagues, or was "not always solicitous of his fellow judges' needs or feelings" in the use of courtrooms, would be guilty of abusing his judicial power. Although I understand the Committee's desire to include a sufficient number of incidents to establish patterns of conduct, because I think that judicial discipline must not interfere with judicial independence, the Committee should have restricted its Report to incidents that, if occurring repeatedly, would represent clear abuses of judicial power. As it stands, the Report leaves unclear whether the patterns formed by these more trivial incidents were at all abusive, let alone clearly abusive. If they were abusive, the Committee failed to explain why. The Report thus leaves open the possibility that Judge McBryde was sanctioned in part for legitimate judicial behavior. And absent an explanation of how such conduct constitutes a clear abuse of judicial power, imposing sanctions based on this record risks chilling legitimate conduct by other judges.

In the second category of incidents presented in the Report – those involving conduct that, although more clearly bordering on the abusive, might nonetheless be entirely appropriate under some circumstances, *see supra* at 71 – I think the Committee similarly failed to explain adequately what made Judge McBryde's conduct clearly abusive, and thus sanctionable. Consider, for example, the Report's description of instances in which Judge McBryde accused attorneys of bad faith. According to the Report, these incidents form a pattern that reveals Judge McBryde's "proclivity to question the integrity of

attorneys appearing before him." Report at 124. Yet the Committee fails to establish that these incidents, taken together, were clearly abusive. Much of the Report's discussion simply recounts that on several occasions Judge McBryde "exhibited distrust of attorneys' motives" and "often directly accus[ed] them of lying or conspiring to deceive him." *Id.* at 124-25. This in itself is unremarkable, since evaluating attorney good faith is one of a trial judge's functions.

The Report does suggest, however, that what sets these incidents apart is that Judge McBryde's suspicions were "unfounded," *id.* at 150, and that the Judge had "refus[ed] to take simple steps to verify whether or not his suspicion of bad faith on the part of others [was] justifiable." *Id.* at 126. I agree that a pattern of consistent, unfounded accusations of bad faith might well represent a clear, sanctionable abuse of judicial power. In explaining why these accusations were "unfounded" or otherwise problematic, however, the Committee gives little or no weight to how things would have looked to an objectively reasonable judge in Judge McBryde's position. In one case, for example, the Report states that "[w]e believe [that an attorney accused of bad faith] told the Special Committee the truth" when he testified that he had not lied to Judge McBryde, Report at 17 n.4; yet the Report never explicitly says whether Judge McBryde himself lacked any reasonable basis for believing the lawyer was deceiving him. Likewise, when describing the *Torres* incident, the Report criticizes Judge McBryde's treatment of the clerk of the court without considering whether the Judge had a reasonable basis for thinking the clerk's conduct verged on contempt. *See id.* at 72-78; *cf. In re McBryde,* 117 F.3d 208, 219 (5th Cir. 1997) ("Judge McBryde's understanding of the factual basis for suspecting that Clerk Doherty was on the verge of contempt was similarly within the bounds of reason."). How can conduct amount to a clear abuse of judicial power unless that conduct seemed abusive to an objectively reasonable judge? Put differently, it seems absurd to say that conduct is clearly abusive if a reasonable judge under the circumstances would have thought it appropriate.

The Report's discussion of the manner in which Judge McBryde enforces his trial rules is similarly flawed. I agree that

if a judge "imposes unduly stringent rules on advocates and enforces these rules in an often harsh manner," and if as a result those rules "so restrict cross-examination that they impede the effective administration of justice," that conduct should be sanctionable. Report at 116. Yet the Report's description of Judge McBryde's rules and their enforcement includes many phrases and characterizations that encompass perfectly legitimate trial practices: Judge McBryde's cases are "replete with [the Judge's] constant admonishments to counsel to move on to something else; not to allude to a stipulated fact; and orders to (or threats to order) lawyers to sit down during openings of the examination of witnesses," *id.* at 110; "Judge McBryde ultimately uses the threat of contempt and sarcasm to enforce his rules," *id.* at 111; "[t]he Committee heard numerous additional examples of Judge McBryde's interrupting a lawyer during the questioning of a witness or conduct of the trial to enforce one or more of his rules, sometimes in a harsh, threatening, or sarcastic manner," *id.* at 113. To be sure, the Report also states that the Committee was "fully cognizant of the notion that a trial judge should be afforded broad discretion to manage and conduct trials," and that Judge McBryde's "extreme and unduly restrictive rules" and manner of enforcement were "different not only in degree but also in kind from the wide array of acceptable trial management rules." *Id.* at 121-22. But simply stating this conclusion provides insufficient guidance about why in Judge McBryde's case "admonishments to counsel to move on," "the threat of contempt and sarcasm," or other routine conduct amounted to a clear abuse of judicial power. Because this section of the Report contains too much general language that could describe any judge's appropriate courtroom conduct, resting sanctions on these descriptions could chill the legitimate exercise of judicial power.

The Council failed in other ways to take sufficient account of the Report's chilling effect. In its discussions of Judge McBryde's accusations of attorney bad faith, for example, the Report never acknowledges that judges must often assess attorney good faith, or that it is not necessarily out of order for a judge to attempt to send a message to an entire office that has given him problems in the past. *See Bonds v. District of*

Columbia, 93 F.3d 801, 805 n.7 (D.C. Cir. 1996) ("If they [the District's counsel] don't show, you proceed without them. If the witnesses don't show, I'll hold them in contempt. That's the only way I can deal with the District of Columbia Government these days.") (quoting trial transcript). Nor does the Report sufficiently acknowledge that district judges need a reasonable margin of error in making findings of bad faith, especially when presiding over tense trials calling for quick decisions to control the behavior of aggressive lawyers. Nor, finally, does the Report recognize that assessments of attorney bad faith are not necessarily abusive even if later set aside on appeal. *See* Report at 14-15 ("The Fifth Circuit . . . noted that there was no evidence of bad faith on the [accused party's] part."). To avoid chilling appropriate judicial conduct, I think the Committee should have explained more thoroughly and more explicitly how Judge McBryde's behavior differed from permissible exercises of judicial power.

The Council's insensitivity to the potentially chilling effect of its Report is likewise apparent in its discussion of the impact Judge McBryde's behavior had on others. Describing the effect of Judge McBryde's enforcement of his trial rules upon the adversarial process, as well as the impact of the Judge's abusive treatment of attorneys upon the Fort Worth legal community as a whole, the Committee often seems to credit the views of witnesses who testified before it without ever determining whether those views represented what reasonable lawyers would have felt in similar circumstances. The Report explains, for example, that the prosecutor Judge McBryde accused of using a "cat-and-mouse approach to discovery" left legal practice in part as a result of that incident, quoting at length the attorney's explanation of why the threat of Judge McBryde's treatment led him to leave his job. *See* Report at 51. Similarly, the Report cites the testimony of numerous lawyers who stated that they felt oppressed, harassed, afraid to ask questions, and generally unable to function effectively in Judge McBryde's courtroom. *See id.* at 116-21, 132-37.

I agree that a judge whose harsh management of trials makes it impossible for lawyers to practice in front of him creates a serious problem. I also understand that proving that a judge had

such an effect requires testimony from lawyers who practice before the judge. But in examining the testimony of such lawyers, the Committee should have attempted to discern not simply whether Judge McBryde had a disruptive effect on the Fort Worth legal community, but also whether his conduct would clearly prejudice the ability of reasonably resilient and thick-skinned lawyers to present their cases effectively.

In sum, I have no doubt that several of Judge McBryde's actions were clearly sanctionable: they were flagrant abuses of judicial power. In its understandable desire to be thorough, however, the Committee included in its Report many actions and incidents which either seem to be entirely appropriate or involve conduct that might have been appropriate under some circumstances. I understand that even actions which are not obviously and flagrantly abusive on their face can be abusive either in context or as part of a pattern. Because of the fundamental importance of judicial independence and the risk that sanctions could punish or chill legitimate judicial behavior, however, I think that sanctioning such conduct requires judicial councils to explain precisely how and why it rises to the level of a clear abuse of judicial power. Here, the Committee's Report falls far short of this standard. I would therefore have remanded the case to the Council with instructions to limit its Report to evidence that, when viewed objectively, demonstrates a pattern of conduct that amounts to a *clear* abuse of judicial power, or a pattern of conduct *clearly* prejudicial to the adversarial process, and then in light of this sharpened record, to re-evaluate the appropriateness of the sanctions and to impose those sanctions deemed necessary to deter future misconduct by Judge McBryde and other judges and to preserve the reputation and integrity of the federal judiciary.

V

Because my colleagues recognize that Judge McBryde's challenge to the reprimand is not moot, the substance of the foregoing analysis is largely unaffected by their view that his challenge to the suspensions *is* moot. But because under my colleagues' theory of mootness, a judge suspended for only a

few years but not reprimanded would never be able to challenge the suspension, I respectfully register my disagreement with this aspect of the court's opinion. In my view, Judge McBryde's challenge to his suspensions is not moot for two independent reasons. First, the suspensions – which remain published on the Fifth Circuit's web site, *see* http://www.ca5.uscourts.gov /mcbryde/council.htm (last visited Sept. 6, 2001) – give rise to ongoing stigmatic and reputational injury at least as serious as that of the reprimand. Second, Judge McBryde raises an issue that seems "capable of repetition yet evading review." *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975). Although this court's opinion puts Judge McBryde on notice that his peers can constitutionally sanction him for some inappropriate in-court conduct, *see* Maj. Op. at 68, the opinion leaves unclear precisely what kind of conduct would trigger sanctions. The court never decides whether it was constitutional for the Judicial Council to have sanctioned Judge McBryde for the conduct described in the Report, and I do not think informing Judge McBryde in the abstract that he must give his colleagues at least a "modicum of civility and respect," *id.*, provides much guidance about what kind of conduct is constitutionally sanctionable. Thus, even assuming that Judge McBryde accepts the court's conclusion that his peers can punish him for *some* in-court conduct, he will not know whether it is constitutional for his peers to sanction him for behavior like that described in the Report. *See* Report at 59 (stating that Judge McBryde believed his incarceration of a lawyer for refusal to answer a question was "appropriate under the circumstances"); *id.* 63-64 (quoting transcript of Committee hearing suggesting that Judge McBryde thought it was appropriate under the circumstances to have a state court judge removed from his chambers without asking the state judge why he had come to see Judge McBryde). Given this uncertainty, and given Judge McBryde's aggressive judicial style, there is ample reason to suspect that his behavior might again provoke sanctions.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLUMBIA

No. 98-2457 (CKK)

HON. JOHN H. MCBRYDE,
Plaintiff,
v.
COMMITTEE TO REVIEW CIRCUIT
COUNCIL CONDUCT AND DISABILITY
ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES,
HON. WILLIAM J. BAUER, THE
JUDICIAL COUNCIL OF THE FIFTH
JUDICIAL CIRCUIT, HON. HENRY A. POLITZ,
Defendants,
and
THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

Decided December 30, 1999.

MEMORANDUM OPINION

KOLLAR-KOTELLY, District Judge.

This case arises out of an investigation by a Special Committee ("Special Committee") of the Judicial Council of the Fifth Judicial Circuit ("Judicial Council") into the conduct of the Honorable John H. McBryde, United States District Judge for the Northern District of Texas, pursuant to the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c). The Special Committee's investigation spanned two years, culminating in a 159-page Report containing findings of fact and recommendations to the Judicial Council. On December 31, 1997, upon consideration of the Special Committee's Report and various responses thereto, the Judicial Council publicly reprimanded

Judge McBryde for "conduct prejudicial to the effective administration of the business of the courts." As a remedial measure, the Judicial Council ordered that no new cases be assigned to Judge McBryde for a period of one year, and disqualified Judge McBryde from participating in any cases involving certain attorneys for a period of three years. Although the disqualification order took effect immediately, the assignment order was stayed while Judge McBryde sought review from the Judicial Conference of the United States. On September 18, 1998, the Committee to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the United States ("Review Committee") substantially affirmed the Judicial Council's Order. Upon this affirmance, the assignment order took effect immediately, subject to the Review Committee's proviso that it could be lifted if the Judicial Council found that "Judge McBryde's conduct indicates that he has seized the opportunity for self- appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct."

In an eight-count complaint filed on October 15, 1998, Judge McBryde challenges the constitutionality of the Act, both facially and as applied to him, on the grounds that the Act violates the separation of powers doctrine (Counts I, II and III), fails to afford due process (Count VI), and violates the First Amendment (Count VIII). In addition, Judge McBryde claims that the proceedings violated the Act and the Fifth Circuit Complaint Rules (Counts IV, V and VII). Judge McBryde names as defendants the Judicial Council of the Fifth Judicial Circuit and its Chairman, the Honorable Henry A. Politz; and the Committee to Review Circuit Conduct and Disability Orders of the Judicial Conference of the United States ("Judicial Conference") and its Chairman, the Honorable William J. Bauer ("Defendants"). This court granted permission for the United States to intervene as a defendant for the limited purpose of defending the constitutionality of the Act.

Before the Court are cross-motions for summary judgment and/or to dismiss filed by Judge McBryde, the Defendants, and the United States. For the reasons elaborated below, the Court finds that the Act is constitutional, both on its face and as it has

been applied to Judge McBryde, except insofar as its confidentiality clause impermissibly inhibits Judge McBryde's ability to speak openly about the proceedings. In particular, the Court finds that the Act does not usurp or encroach upon the power of impeachment that properly resides with the Legislative Branch. Nor does the Act jeopardize the independence of the judiciary, an invaluable facet of our democracy that stands to be enhanced by judicial self-monitoring. Moreover, because the Act authorizes review not of the merits of a judge's legal decisions, but of a judge's alarming or destructive pattern of conduct, it poses no threat to a federal judge's Article III function.

In response to Defendants' contention that the Act's finality clause bars review of Judge McBryde's claims, the Court determines that it retains jurisdiction to consider these claims to the extent they allege facial violations of the statute or violations of Judge McBryde's constitutional rights, whether facial or as-applied. Thus authorized to conduct such a review, the Court concludes that no facial violations of the statute took place, with respect either to the scope of the investigation or to the nature of the material which the Special Committee and the Judicial Council addressed. After evaluating carefully Judge McBryde's assertion that Defendants impermissibly reviewed the merits of his judicial decisions, the Court finds that they confined their investigation to a pattern of behavior toward attorneys and others, which they found demonstrates intemperance and abusiveness. Further, the Court concludes that the sanctions levied against Judge McBryde did not transgress into the forbidden realm of impeachment, but rather were limited in scope and tailored to the problem that his behavior posed. The Court finds against Judge McBryde on his due process claims, since Defendants provided him with the fundamental requirements of due process, including notice and an opportunity to be heard.

The Court is, however, persuaded by Judge McBryde's contention that the Act's confidentiality clause, as it has been applied to him, operates as an impermissible prior restraint on his speech. Now that the proceedings have concluded and the sanctions against him have been imposed, Judge McBryde must enjoy the opportunity to speak openly and freely about those

proceedings, absent some sufficiently compelling interest to justify curtailment of this opportunity. Defendants have demonstrated no interest of that magnitude here.

I. BACKGROUND[1]

The Judicial Council's investigation and subsequent discipline of Judge McBryde represents the most significant application of the Judicial Conduct and Disability Act, 28 U.S.C. § 372, since its enactment in 1980. Congress designed the Act to provide a mechanism whereby the Judicial Branch can systematically investigate and resolve allegations of judicial misconduct or disability. *See* S.Rep. No. 96-362, at 1, *reprinted in* 1980 U.S.C.C.A.N. 4315, 4315. In an effort to address "the growing public demand for the accountability of public officials," *id.* at 5, members of Congress and the Judicial Branch worked together to draft legislation that would provide an alternative means of remedying conduct that is prejudicial to the administration of justice, and yet does not rise to the level of an impeachable offense, criminal infraction, or reversible error. *See* H. Rep. No. 101- 512, at 10, *reprinted in* 1990 U.S.C.C.A.N. 6879, 6884 (detailing the involvement of the judiciary in drafting the Act). The conduct targeted by the Act ranges from such intangibles as a lack of "judicial temperament" to patterns of abusive behavior that threaten to undermine the integrity of the judiciary as a whole, as well as behavior symptomatic of an underlying disability. While recognizing that cases of judicial misconduct were infrequent, Congress found that these "[r]are instances of judicial misconduct that have gone unchecked prompt the establishment of a procedure within the judiciary for the processing of complaints aimed at a federal judge." S.Rep. No. 96-362, at 5. The ultimate question before the Court is whether these procedures violate the Constitution, both on their face and as they were applied to Judge McBryde.

A. The Statutory Scheme

In this section, the Court shall present a brief overview of those statutory provisions at issue in this litigation. Section 372(c)(1) permits any person alleging that a district judge "has engaged in conduct prejudicial to the effective and expeditious

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[1] An *Index* can be found at the end of this Memorandum Opinion.

administration of the business of the courts" to file a written complaint with the chief judge of the circuit. 28 U.S.C. § 372(c)(1). In the alternative, § 372(c)(1) allows the chief judge to "identify" a complaint on the basis of information available to him or her. *Id.* Upon expeditious review of a complaint, the chief judge has three options: he may dismiss the complaint, *see id.* § 372(c)(3)(A); conclude the proceeding, *see id.* § 372(c)(3)(B); or initiate an investigation by appointing a special committee, *see id.* § 372(c)(4)(A).

If the chief judge decides to appoint a special committee to investigate the charge, the committee "shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." *Id.* § 372(c)(5). After the special committee files its report, the Act empowers the judicial council to respond in a number of ways. If it appears necessary, the judicial council may conduct an additional investigation pursuant to § 372(c)(6)(A). Alternatively, the judicial council may dismiss the complaint pursuant to § 372(c)(6)(C). If the judicial council decides to act on the special committee's report, the Act directs that the judicial council

> shall take such action as is appropriate to assure the effective and expeditious administration of the business of the courts within the circuit, including, but not limited to, any of the following actions:
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> ...
>
> (iv) ordering that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint;
>
> ...
>
> (vi) censuring or reprimanding such judge or magistrate by means of public announcement; or
>
> (vii) ordering such other action as it considers appropriate under the circumstances.

Id. § 372(c)(6)(B). Although a complainant or judge aggrieved by the judicial council's action may petition the Judicial Conference of the United States for review, in all other respects, any orders and determinations "shall be final and conclusive and

shall not be judicially reviewable on appeal or otherwise." *Id.* § 372(c)(10).

Judge McBryde has also challenged the Act's confidentiality clause, *id.* § 372(c)(14), which renders confidential "all papers, documents, and records of proceedings related to investigations conducted under this subsection." These materials "shall not be disclosed by any person in any proceeding," unless "such disclosure is authorized in writing by the judge ... who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee ...." *Id.* § 372(c)(14)(C). The confidentiality clause features certain other exceptions, but § 372(c)(14)(C) is the only one that is at issue here.

B. The Special Committee's Investigation and Report

Judge McBryde's difficulties with his colleagues on the Fifth Circuit date back to the spring of 1995, when Chief Judge Jerry Buchmeyer of the Northern District of Texas transferred two cases from Judge McBryde's docket to his own. *See* In re *McBryde,* 117 F.3d 208 (5th Cir.1997) ("*McBryde I*") (providing a detailed description of the events leading up to the transfers). In May 1995, Chief Judge Politz convened a meeting with Judge McBryde and Chief Judge Buchmeyer in an attempt to resolve informally this dispute over the matters involving the two cases, *United States v. Satz,* and *Torres v. Trinity Industry Inc. See* Pl.'s 108(h) ¶ 14. At the meeting, Judge McBryde informed his colleagues that he intended to seek the Judicial Council's assistance in returning these cases to his docket. *Id.* ¶ 15. In response, Chief Judge Politz "told Judge McBryde that if he sought the assistance of the Judicial Council in resolving the legal issue at the heart of this dispute, his entire career as a judge would be explored." *Id.* ¶ 16. Notwithstanding this remark, Judge McBryde filed a request for assistance in June 1995, pursuant to 28 U.S.C. § 332. *Id.* ¶ 19.

In July 1995, an attorney filed a complaint describing Judge McBryde's "obstructive, abusive, and hostile conduct" during trial.[2] *Id.* ¶ 20. While the controversy over *Satz* and *Torres*

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[2]In an effort to comply with the confidentiality clause, the Court shall refrain from naming any of the witnesses who testified before the

continued to develop, Chief Judge Politz "identified" other complaints about Judge McBryde. *See* 28 U.S.C. § 372(c)(1) (authorizing the Chief Judge to identify complaints). On September 13, 1995, Chief Judge Politz appointed a Special Committee pursuant to 28 U.S.C. § 372(c) to investigate the allegations of misconduct that had been levied against Judge McBryde. Pl.'s 108(h) ¶ 24(u). This same committee was also charged with the task of investigating Judge McBryde's request for assistance with *Satz* and *Torres*. *Id.* ¶ 27. The Special Committee held a hearing on Judge McBryde's request for assistance on October 19, 1995.[3] *Id.* ¶ 29. Although the Judicial Council denied Judge McBryde's request for assistance, *id.* ¶ 44, the United States Court of Appeals for the Fifth Circuit ultimately granted Judge McBryde's petition for a writ of mandamus and vacated Chief Judge Buchmeyer's reassignment orders. *See McBryde I,* 117 F.3d at 231.[4]

During the nineteen months between the denial of Judge McBryde's request for assistance and the Fifth Circuit's decision in *McBryde I,* the Special Committee continued to spar with Judge McBryde. The members of the Special Committee were "concerned about two things: first, that Judge McBryde may have a health problem (mental or physical) which affects his activities as a judge, and second, that Judge McBryde has engaged in a pattern of abusive behavior as a federal judge." Report at 3. These concerns led the Special Committee to seek the advice of two psychiatrists, without Judge McBryde's knowledge or consent. Pl.'s 108(h) ¶¶ 51-54. On the recommendation of the two psychiatrists, the Special

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Special Committee.

[3]Judge McBryde has raised numerous objections to this § 332 hearing, none of which is properly before the Court in this challenge to the constitutionality of § 372(c).

[4]Two of the complaints against Judge McBryde pertained to the *Satz* and *Torres* matters. After the Fifth Circuit vacated Chief Judge Buchmeyer's order, the Special Committee "determined not to hear evidence in [the § 372(c)] proceeding concerning the sufficiency of the record that was before Judge McBryde in *Satz* and *Torres*." Report at 8.

Committee asked Judge McBryde to submit to a psychiatric evaluation. *Id.* ¶ 55. Judge McBryde refused. On July 31, 1996, the Special Committee obtained an order from the Judicial Council requiring Judge McBryde to undergo a full psychiatric examination. *Id.* ¶ 73. After Judge McBryde initiated a lawsuit challenging the order, the Judicial Council sought a contempt finding against Judge McBryde for violating the order. *Id.* ¶¶ 76-79. Concerned that the 372(c) investigation was becoming mired in controversy over the psychiatric examination, the Special Committee obtained a stay of these proceedings. *Id.* ¶ 81.[5]

Two other significant developments occurred during this period. Reacting to the mounting allegations of "repetitive, abusive, and excessive conduct by Judge McBryde beyond the allegations in the five complaints," Chief Judge Politz decided to expand the scope of the investigation pursuant to § 372(c)(5), and Judge McBryde engaged in a series of legal skirmishes with the Judicial Council and the Fifth Circuit over the appropriate forum for subpoenas *ad testificandum* and *duces tecum. See* Report at 8; *see generally In re McBryde,* 120 F.3d 519 ("*McBryde II* ").

On August 25, 1997, the Special Committee's evidentiary hearings finally commenced. Report at 9. The Special Committee Report summarized these proceedings as follows:

> The Special Committee conducted evidentiary hearings in New Orleans on August 25 through August 29, 1997 and in Forth Worth on September 29 through October 2, 1997. During the nine days of hearings, the Special Committee received in evidence hundreds of exhibits, mostly court records and transcripts in matters before Judge McBryde.

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[5]In lieu of prevailing upon Judge McBryde to undergo a full psychiatric examination, the Special Committee ultimately retained a psychiatrist who attended the evidentiary hearings, listened to witness testimony, and observed Judge McBryde's demeanor. At the conclusion of the hearing, the psychiatrist submitted a report summarizing his observations and offering his clinical impressions, without actually advancing a diagnosis. The Special Committee appended the psychiatrist's correspondence as an attachment to its Report. *See id.* ¶¶ 81, 131; Report, Attachment A.

> Among the witnesses presented by Special Counsel were four federal District Court Judges; one Texas State Court Judge; a former U.S. Attorney for the Northern District of Texas; the Director of Enforcement of the Securities and Exchange Commission; the head of the Public Defender's Office in Fort Worth; Assistant U.S. Attorneys and Federal Public Defenders; the Clerk of the District Court for the Northern District of Texas; and private attorneys who practiced before Judge McBryde. Judge McBryde's witnesses included private and public attorneys who practiced before him; court personnel; employees of the General Services Administration ("GSA"); former members of juries which decided cases over which he presided; and present and former members of his staff.

Report at 9-10. After digesting evidence about numerous discrete incidents and events spanning Judge McBryde's tenure as a federal judge, the Special Committee concluded that "[w]hen viewed in isolation, the incidents described above run the gamut from outrageous to inappropriate. When viewed together, the incidents bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench." *Id.* at 124. These patterns fall into five categories: "Proclivity to Question Integrity," *id.* at 124-27, "Overreactions and Abusive Sanctions," *id.* at 127-28, "Obsessive Need to Control," *id.* at 128, "Inappropriate Conduct Toward Fellow Judges," *id.* at 130-31, and "Effect on the Legal Community," *id.* at 132-37. On December 4, 1997, the Special Committee published its findings in an extensive and detailed Report. Without repeating every detail of the Special Committee's extensive findings, which comprise over 100 pages of the Report, the Court will briefly recount some of the representative events of Judge McBryde's behavior.[6]

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[6]The Special Committee organized its Report around twenty discrete scenarios exemplifying Judge McBryde's intemperate and abusive behavior, one of which encompasses several incidents. *See* Report, Table of Contents. In addition, the Report related in more summary terms other examples evidencing Judge McBryde's conduct, and its impact on the legal community.

The Special Committee found that Judge McBryde tends to "overreact to perceived transgressions of his rules and expectations or intrusions on his authority." *Id.* at 127-28. In one incident, Judge McBryde held an attorney in contempt of court when, due to a malfunctioning of the telephone system, the attorney's office was unable to initiate a prompt conference call with the Court and opposing counsel. *Id.* at 52-55. Although Judge McBryde acknowledged that, "on the surface," holding the attorney in contempt was unfair, he maintained that trial lawyers have to have a "tough skin." *Id.* at 55. He further justified his severe reprimand by adding that "[t]hings like that have been said to me by judges over the years. It didn't hurt my feelings. That's part of our business." *Id.* Terrified of Judge McBryde after this incident, and fearful about testifying before the Committee, the attorney accepted a temporary transfer to another district following his appearance as a witness in the Special Committee hearings. *Id.*

On another occasion, a criminal defense attorney declined to answer a question which Judge McBryde posed because he believed erroneously that his response would waive his client's privilege and redound to his client's detriment. Judge McBryde refused to recess the proceeding to allow the attorney an opportunity to consult with his client or to research the issue before responding to Judge McBryde. Instead, Judge McBryde ordered in open court that the attorney be incarcerated until he agreed to answer the question, holding the attorney in civil contempt of court for not responding to his question. *See id.* at 57-59. The Special Committee did not focus on whether or not the claimed attorney-client privilege was valid--and the Court of Appeals later found that it was not--but on Judge McBryde's treatment of the attorney. For instance, in reference to Judge McBryde's unwillingness to recess the proceedings to allow the attorney to research an issue which had arisen unexpectedly, the Committee wrote: "There was no exigency warranting this treatment of [the attorney], other than the self-defined exigency of Judge McBryde to complete the proceeding once it had begun." *Id.* at 59.

In a different case, an attorney received a call from chambers at 4:50 p.m. to inform him that, in response to his

motion to continue a sentencing, the court had scheduled a hearing for 9:00 a.m. the following morning, and would require the physician to testify live at the hearing as to his client's medical condition necessitating continuance of the sentencing. The attorney was able only to arrange for the physician to participate in a telephone conference call before the physician left town. Judge McBryde first ordered the attorney ejected from the courtroom, and later, upon permitting him to reenter, questioned the attorney in a belittling fashion about his knowledge of the use of subpoenas. *See id.* at 89-91.

These and other such examples describe incidents in which counsel appearing before Judge McBryde attempted to explain, on the record, why they had been unable to comply with the Court's orders. Judge McBryde, however, refused to listen to the attorneys' explanations, cut them off, and dealt with them in a humiliating and sarcastic manner. Without commenting on the merits of the lawyers' explanations, the Special Committee found that the sanctions Judge McBryde meted out were disproportionate to the perceived infractions, and that "this tendency to overreact and to impose disproportionate sanctions makes conducting trials or other proceedings before Judge McBryde extremely stressful on some lawyers." *Id.* at 127-28. As all attorneys and judges are aware, collateral consequences involving the state bar association attach when a judge finds an attorney in contempt of court. Moreover, federal prosecutors in particular bear an obligation to report to the Office of Professional Responsibility of the Department of Justice when a federal judge accuses them of dishonesty. *See id.* at 82 n. 33.

The Special Committee also found that Judge McBryde exhibited a tendency to accuse attorneys of mendacity without taking even the most rudimentary "steps to verify whether or not his suspicion of bad faith on the part of others is justifiable." *Id.* at 126.[7] In one such incident, he accused government counsel of

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[7]Elsewhere the Special Committee described "a disturbing pattern on Judge McBryde's part of making devastating allegations of deceit and bad faith against attorneys who disagree with him." *Id.* at 35.

negotiating in bad faith in violation of a local rule during a settlement discussion, and threatened sanctions against the attorney solely on the basis that counsel would not agree to a provision in the settlement agreement that the enforcement order be sealed from public view. *Id.* at 12. On the record, Judge McBryde berated counsel and disparaged his position that the need for public disclosure was a principle of law enforcement critical to the government agency. *Id.* at 12-14. When the attorney steadfastly adhered to the principle of full disclosure, Judge McBryde reacted in such an angry and accusatory manner that government counsel met with his colleagues to discuss his fear that he might be held in contempt and incarcerated. *Id.* at 14. Again, the Special Committee focused on Judge McBryde's treatment of this and other attorneys rather than on whether or not Judge McBryde was correct on the merits of his determination that the order should be sealed.[8]

In a similar incident, Judge McBryde again concluded that government counsel were not acting in good faith in settlement proceedings when they failed to make a monetary settlement offer to a plaintiff. *Id.* at 38. He issued a show cause order as to why they should not be held in contempt and conducted a lengthy hearing to inquire into the attorneys' reasoning for not making such an offer, the transcript of which the Special Committee found to include "dozens of pages of invective" by Judge McBryde. *Id.* at 37-39. Characterizing the government's motion for summary judgment in this case as "an affront to the Court," Judge McBryde "issued a broad attack on the integrity of the entire [office]," suggesting that its attorneys were " 'not always candid with the Court.' " *Id.* at 38. Without regard to the accuracy of Judge McBryde's allegations, the Special

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[8]On appeal, the Fifth Circuit held that the district court had abused its discretion in sealing the final order and transcript, reversing and remanding the case to Judge McBryde. *See S.E.C. v. Van Waeyenberghe,* 990 F.2d 845, 847 (5th Cir.1993). The court also found that the counsel opposing the sealing order was not in fact acting in bad faith. *See id.* at 849 n. 5. The Court of Appeals did not, however, comment on Judge McBryde's behavior toward the attorney, but instead merely asserted that Judge McBryde's accusation of bad faith was incorrect.

Committee found that "the sarcastic and abusive language used by Judge McBryde is itself a cause of concern. There was simply no good reason to belittle and attack [the attorneys] in such a repetitive and relentless manner." *Id.* at 39.[9]

On another occasion, Judge McBryde ordered on the record in open court that an attorney attend fifteen hours of a remedial reading course--and submit an affidavit attesting to her compliance with this mandate--because of her failure to adhere to Judge McBryde's standing order that each party appear in person at settlement conferences. *Id.* at 21-22. After imposing this humiliating sanction, he rejected her initial affidavit of compliance, questioning her integrity, and required that she submit a new one which set out in detail the dates, times, and places of attendance. *Id.* at 22. A separate incident involved one trial attorney's failure to remain in continuous contact with the court during jury deliberations. When Judge McBryde's chambers informed the attorney that the deliberating jury had recessed for lunch, the attorney left the courthouse. *Id.* at 26-27. Chambers had advised the attorney in error, though, as the jury had decided to forgo lunch and to continue to deliberate, reaching a verdict while the attorney remained unavailable for 45 minutes. *Id.* at 27. As a result, Judge McBryde ordered that the delinquent attorney *and every attorney in his office* wait, without exception, on the fourth floor of the courthouse throughout jury deliberations in any case before him, including

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[9]The sanctions which Judge McBryde imposed upon the government attorneys in this case also reached the Fifth Circuit on appeal. *See Dawson v. United States,* 68 F.3d 886 (5th Cir.1995). Ultimately, the court of appeals vacated the order imposing sanctions, and reversed the findings of bad faith against government counsel. *See id.* at 898-99. In a footnote regarding the government's summary judgment motion and the Texas statute upon which the government relied, but had failed to raise at an earlier stage in the proceedings (*i.e.,* as an affirmative defense), the *Dawson* court declined to address the district court's conduct directly. Instead, the court of appeals included a suggestive remark responding to portions of Judge McBryde's order quoted earlier in the opinion: "Equally, whether this failure, or counsels' raising the Texas statute by other means, merited the court's scathing rebuke, as quoted *infra,* is another matter upon which we will not comment." *Id.* at 891 n. 5.

through any lunch break or recess of the deliberations. This order remained in effect for sixteen months. *Id.* at 27-30. It was lifted only when an attorney from that office had to try a case before Judge McBryde on another floor while simultaneously required to wait on the fourth floor in compliance with Judge McBryde's order. *Id.* at 28-29. The Special Committee found that these incidents and others reflect "an abusive tendency," a "lack of judicial temperament," *id.* at 127, and an "obsessive need to control" other persons and proceedings, *id.* at 129.

Additionally, the Special Committee listened to testimony suggesting that attorneys who otherwise would have asked certain questions or marshaled certain arguments in order to make their record felt so intimidated by Judge McBryde, and so fearful that he would undermine them openly before a jury, that they stifled their better litigation judgment. For example, one attorney testified that, when trying a case before Judge McBryde, he and others in his office generally declined to pose questions during jury voir dire out of fear that Judge McBryde would humiliate them in front of prospective jurors. *Id.* at 120. Others offered similar examples of the extent to which Judge McBryde's harsh, ridiculing, and seemingly arbitrary treatment of lawyers appearing before him exercised a chilling effect on those attorneys' zealous representation of their clients. *See, e.g., id.* at 111-13, 115-16. The Special Committee found this behavior on Judge McBryde's part to be particularly troubling, suggesting that "the cumulative effect of his trial procedures impedes the ability of lawyers to try their cases." *Id.* at 122 (citing *Sims v. ANR Freight System, Inc.*, 77 F.3d 846, 850 (5th Cir.1996)). One government counsel testified that his entire office anticipated appearances before Judge McBryde with great trepidation, and that the office had to stay on constant guard lest the attorneys make litigation decisions--such as settlement offers--out of fear rather than considered legal judgment. *Id.* at 133-34. As a general matter, the Special Committee emphasized the breadth of "Judge McBryde's negative effect on the Fort Worth legal community ...." *Id.* at 135. Notwithstanding its severity and manifestly negative repercussions, the Special Committee underscored the fact that Judge McBryde's intemperate and abusive behavior eluded redress except through

the kind of disciplinary channel contemplated by the Act. In the words of the Special Committee,

> [t]he very nature of the effect of Judge McBryde's pattern of conduct-- the failure of lawyers to act; the decision to forgo asking questions or moving for relief; the sleepless nights; the refusal to accept cases; the decision to seek employment elsewhere; the compromising of advocacy as a form of self-protection--cannot be remedied through the appellate process and often cannot even be articulated in isolation. Nevertheless, the harm to the administration of justice is palpable and must be redressed.

Id. at 137.

Finally, the Special Committee heard testimony recounting interactions between Judge McBryde and other members of the Judiciary, both Federal and State, in which Judge McBryde behaved in a disrespectful and offensive manner. For instance, an attorney was involved in a jury trial before a state judge at the same time that Judge McBryde had scheduled the attorney to appear at a pretrial conference. *See id.* at 60. Concerned about the prospective overlap, counsel filed a request for a continuance on the day before the pretrial conference. Judge McBryde denied the request. *Id.* Surprised because jury trials usually take precedence over other matters, counsel alerted the state court judge to the conflict. The state court judge suggested that he and counsel arrive early in court to place a joint call to Judge McBryde in order to assure him that the attorney was in fact in trial. *Id.* Finding Judge McBryde not yet in his chambers, the two left a message to this effect; the state court judge specifically requested that Judge McBryde telephone him to discuss the conflict, since he was willing to leave the bench to accept Judge McBryde's call. *Id.* at 61.

Having received no word from Judge McBryde shortly before the pretrial conference was scheduled to commence, the state court judge excused the attorney and recessed the trial, leaving the jury waiting for counsel's return. *Id.* At that point, the state court judge determined to see Judge McBryde privately in order to explain the situation. Along with his court reporter who drove him to federal court, leaving behind her reporting equipment, the state court judge traveled to Judge McBryde's

chambers where he was directed to wait in a conference room along with two lawyers who were participating in the pretrial matter. *Id.* Shortly thereafter, one of Judge McBryde's law clerks entered the conference room, obviously embarrassed, to deliver a message to the state court judge from Judge McBryde that "Judge McBryde told me to tell you that you are not welcome here and you are to leave." Stunned, the state court judge departed after requesting that Judge McBryde release the trial counsel as soon as possible, since a jury awaited his return to resume the trial. *Id.* at 62. By way of explanation for this conduct, Judge McBryde asserted that he assumed the state court judge had come to engage in a confrontation.[10] *Id.* at 63-64. As evidenced by this incident, Judge McBryde was quick to impute improper motives and bad faith not only to attorneys appearing before him, but also to his peers, whom he treated in a like manner. *See id.* at 64.

In its Report, the Special Committee ultimately recommended that Judge McBryde be given a choice: to retire voluntarily, *id.* at 151-52, or to face sanctions, including a public reprimand, *id.* at 152, suspension of all new case assignments to Judge McBryde for one year, *id.* at 152-54, and disqualification of Judge McBryde for a period of three years in any case involving a lawyer whom the Special Committee had identified as a potential witness at the hearing, *id.* at 154-58.

C. Action by the Judicial Council and the Review Committee

On December 17, 1997, the Judicial Council for the Fifth Circuit held a hearing to consider the Special Committee's Report and Judge McBryde's response thereto. *See* Pl.'s 108(h) Stmt. ¶ 134. Two weeks later, on December 31, the Judicial

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[10]Judge McBryde testified before the Special Committee as follows: "I didn't know whether he was there for the purpose of creating a confrontation of some kind. I simply did not know what he was there for. I was told he was there with a court reporter. I assumed that it was to engage in some kind of inappropriate activity on his part ...." *Id.* at 64. His peers on the District Court fared no better with Judge McBryde. The Special Committee listened to several incidents in which Judge McBryde reacted with rancor and insult to his fellow district court judges. *See* id. at 103-07.

Council published its order and public reprimand, adopting the Special Committee's Report, findings of fact, and recommendations "[t]o the extent relevant to the action" that the Council pursued. *See* Order and Public Reprimand. Rather than attempt to summarize the Order and Public Reprimand, the Court shall take advantage of its brevity to reproduce it in full:

> WHEREAS a Special Investigating Committee of the Council (the "Special Committee"), pursuant to 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit's Rules Governing Complaints of Judicial Misconduct or Disability, conducted an investigation, held hearings over nine days during which over fifty witnesses testified, and received evidence regarding complaints against, and the conduct of, Judge John H. McBryde of the United States District Court for the Northern District of Texas;
>
> WHEREAS, pursuant to 28 U.S.C. § 372(c)(5), the Special Committee issued a report to the Council dated December 4, 19997; and
>
> WHEREAS the Council has considered the record, the Special Committee's Report, the Responses thereto, and statements by counsel and Judge McBryde at the Council's December 17, 1997 meeting.
>
> To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> 1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has

detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Forth Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A.

4. Consistent with 28 U.S.C. § 332(d)(2), the Council directs all judicial officers and employees within the Circuit, particularly the Chief Judge of the Northern District of Texas and the Clerk of the Court for the Northern District of Texas, to take all necessary steps to carry into effect the above orders of the Council.

5. The Council hereby directs that implementation of this Order and Public Reprimand shall be stayed for 30 days after entry so that Judge McBryde may seek to appeal to, and obtain an additional stay from, the Judicial Conference of the United States. This Order shall also remain sealed during the period of any stay thereof.

This order is issued on the date recited below but shall not become effective until all stays have expired or been lifted.

New Orleans, Louisiana, this 31st day of December 1997.

In this Order, the Judicial Council disciplined Judge McBryde with three sanctions: (1) a public reprimand; (2) suspension of all new case assignments for one year; and (3) suspension from participation of cases involving twenty- three attorneys who had testified against him at the hearings. Although the Judicial Council stayed implementation of its order for 30 days pending any appeal by Judge McBryde, Judge McBryde filed an application for a further stay to permit him additional time to petition the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders ("Review Committee") for review. Pl.'s 108(h) ¶¶ 169-172. The Review Committee agreed to stay the Order and Public Reprimand, with the exception of paragraph 3, until March 16, 1998, by which time Judge McBryde was required to file his intended petition for review.

On March 16, 1998 Judge McBryde filed seven petitions for review of the judicial council's actions. *See* 28 U.S.C. § 372(c)(10) (authorizing a complainant, judge, or magistrate aggrieved by an action of the judicial council, taken in response to the report of a special investigating committee, to petition the Judicial Conference of the United States for review). After evaluating Judge McBryde's petitions and all of the responsive briefs, the Review Committee issued a Memorandum and Order on September 18, 1998 in which it substantially affirmed the Judicial Council's Order.[11] *See* Review Committee Order at 27.

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[11]In its Order, the Review Committee recounted the history of the Section 372 proceedings involving Judge McBryde, and then proceeded to determine what standard of review it should apply to the Judicial Council's findings of fact (*i.e.*, those the Council adopted from the Special Committee's Report) and judgment with respect to the appropriate sanctions under these circumstances. Review Committee Order at 2-4. After a detailed discussion of the matter, the Review Committee deemed that it should apply an intermediate standard of "substantial deference" to both the factual findings and the Judicial Council's remedies. *See id.* at 4-7. In particular, the Review Committee considered Judge McBryde's challenge to the Special Committee's expansion of the investigation, *id.* at 7-10, his allegation that he received inadequate notice of the expansion of the investigation, *id.* at 10-11,

As its sole modification, the Review Committee authorized the Judicial Council to curtail the one-year period of Judge McBryde's new case assignment sanction if it "finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct." *Id.* at 24.

D. Proceedings in this Court

On October 15, 1998, Judge McBryde filed an eight-count Complaint in this Court against the Review Committee and its chairperson, Judge Bauer, and against the Judicial Council and its chief judge, Chief Judge Politz. Five days later, on October 20, Judge McBryde filed a motion for a temporary restraining order. The United States moved, and on November 5, 1998 the Court granted its request, to intervene for the limited purpose of defending the Act against Judge McBryde's facial constitutional challenges. *See* Order of Nov. 5, 1998. Although Judge McBryde initially indicated his preference that the litigation proceed in three stages--a temporary restraining order, a preliminary injunction, and a trial on the merits for declaratory and injunctive relief--he agreed to the Court's proposal that, in the interests of conserving resources and achieving a prompt resolution of the issues, the latter two stages be consolidated. *See generally* Transcript of October 22, 1998 Phone Conference; Court's Order of October 23, 1998 (stating that "the Court's consideration of a preliminary injunction would be consolidated with a trial on the merits and adjudicated via cross-motions for summary judgment"). On November 2, 1998, the Court denied Judge McBryde's motion for a temporary restraining order, finding that Judge McBryde had not demonstrated that he would suffer irreparable harm if denied injunctive relief. *See generally* Mem. Op. and Order of

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and what the Review Committee labels "other procedural issues" raised by Judge McBryde, *id.* at 11-13. Ultimately, the Review Committee concluded that, under either a clear-and- convincing evidentiary standard or a preponderance-of-the-evidence standard, "the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings." *Id.* at 19.

November 2, 1998; *CityFed Financial Corp. v. Office of Thrift Supervision,* 58 F.3d 738, 746 (D.C.Cir.1995) (enumerating the factors a district court should weigh in determining whether to grant a temporary restraining order). Notwithstanding his earlier agreement, and after the parties had fully briefed their cross-motions for summary judgment, Judge McBryde moved for a preliminary injunction on December 9, 1998. The Court denied this motion on January 5, 1999 for substantially the same reasons it denied Judge McBryde's earlier motion for a temporary restraining order. *See generally* Mem. Op. and Order of Jan. 5, 1999. On June 11, 1999, the Court conducted a hearing for oral argument on the remaining motions.

Judge McBryde also requested, in two separate motions, leave to take discovery in the form of depositions, and in a third motion to continue the pending cross-motions for summary judgment until he had the opportunity conduct those depositions. In particular, Judge McBryde sought to depose participants in the § 372(c) proceedings in the hopes of eliciting facts to controvert the portion of the Judicial Council's Order which asserts that the Council had considered the record, the Report, and Judge McBryde's responses thereto, for the purpose of fashioning its Order and Public Reprimand. The Court denied these motions on September 30, 1999, after determining that Judge McBryde had failed to make a sufficient showing of bad faith or improper motive to justify engaging in discovery. *See generally* Mem. Op. and Order of September 30, 1999; *see also Saratoga Development Corp. v. United States,* 21 F.3d 445, 458 (D.C.Cir.1994) (holding that, under the APA, discovery is warranted only "when 'there has been a strong showing of bad faith or improper behavior' (so that without discovery the administrative record cannot be trusted)") (quoting *Community for Creative Non-Violence v. Lujan,* 908 F.2d 992, 997 (D.C.Cir.1990)).

The Court also denied Judge McBryde's Motion to Deem Admitted Statement Contained in Statement of Material Facts. Judge McBryde contended that, since neither Defendants nor the United States had complied fully with the requirements of the District of Columbia Local Rule 7.1(h) (formerly 108(h)) (mandating that each party file a concise statement setting forth all material facts as to which a genuine issue exists), the Court

should act within its discretion to deem admitted the contents of his 7.1(h) Statement. The Court declined to do so, finding that the alleged deficiencies in Defendants' and the United States' responses to Judge McBryde's 7.1(h) Statement derived from their contention that the finality clause limited this Court's review to the findings contained in the Special Committee's Report, the Judicial Council's Order, and the Review Committee's Memorandum and Order. *See* Mem. Op. of Sept. 30, 1999 at 4-5. Finally, the Court issued an Amended Protective Order releasing certain aspects of the record from the prior sealing order and maintaining others under seal. The confidentiality of the record and the pleadings in this case has presented a series of issues which the Court has resolved along the way. A detailed discussion of these issues and their resolution appears *infra* in Section D of the Court's discussion.

II. DISCUSSION

The Court has divided its discussion of the eight counts of Judge McBryde's complaint into four principal parts. First, the Court will consider Judge McBryde's contention that the Act is unconstitutional on its face because it violates the separation of powers doctrine. Second, the Court will examine its jurisdiction to entertain Judge McBryde's non-constitutional claims and his claims that the Act is unconstitutional as it has been applied to him.[12] Third, the Court shall consider the as-applied portion of Judge McBryde's separation of powers claim and his due process challenge to the Act's application. Finally, the Court will assess Judge McBryde's argument that the confidentiality clause violates the First Amendment.

A. Judge McBryde's Claim that the Act is Facially Unconstitutional

In Count I of his complaint, Judge McBryde contends that "the Act is unconstitutional on its face as it applies to Article III judges because the Act empowers agencies of the Judicial Branch to punish, or change the status of, an Article III judge in violation of the constitutional scheme that the only procedure by which an Article III judge can be disciplined, or have his or her

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[12]The parties are in agreement that the finality clause does not bar review of Judge McBryde's facial constitutional claims.

status changed, is by impeachment through the constitutional impeachment process." Compl. ¶ 72. Judge McBryde acknowledges the legitimacy of three mechanisms for addressing claims of judicial misconduct: appellate or mandamus review by a duly constituted Article III court; impeachment by constitutionally ordained methods; or criminal prosecution. Under Judge McBryde's analysis, the Act runs afoul of this carefully balanced scheme by allowing the Judicial Branch to exercise Congress's exclusive impeachment power (Count I), and by authorizing administrative entities that are not Article III courts to conduct appellate review of his judicial decisions (Count II). As a result of these alleged incursions into the constitutionally protected sphere of judicial decision-making, Judge McBryde further contends that the Act compromises the constitutionally enshrined principle of judicial independence (Count III).

The Court's analysis of Judge McBryde's separation of powers claims is guided by *Mistretta v. United States,* 488 U.S. 361, 109 S.Ct. 647, 102 L.Ed.2d 714 (1989), in which the Supreme Court rejected a separation of powers challenge to the Sentencing Guidelines promulgated by the United States Sentencing Commission. Analyzing the petitioner's claim that the Sentencing Reform Act violated the separation of powers principle, the Court carefully set forth the parameters of this important doctrine. The Constitution is not offended by some degree of commingling of functions among the three Branches, the Court held, so long as the challenged statute "pose[s] no danger of either aggrandizement or encroachment." *Mistretta,* 488 U.S. at 382, 109 S.Ct. 647 (citing *Morrison v. Olson,* 487 U.S. 654, 108 S.Ct. 2597, 101 L.Ed.2d 569 (1988) (upholding judicial appointment of independent counsel); *Commodity Futures Trading Comm'n v. Schor,* 478 U.S. 833, 106 S.Ct. 3245, 92 L.Ed.2d 675 (1986) (upholding agency's assumption of jurisdiction over state-law counterclaims)). Thus, the Act will be unconstitutional only if it "accrete [s] to a single Branch powers more appropriately diffused among separate Branches or undermine[s] the authority and independence of one or another coordinate Branch." *Id.* Where, as here, the Judicial Branch is implicated in a separation of powers challenge, the

Court emphasized the need for particular "vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed 'tasks that are more properly accomplished by [other] branches,' and, second, that no provision of law 'impermissibly threatens the institutional integrity of the Judicial Branch.' " *Id.* at 383, 106 S.Ct. 3245 (internal citations omitted). With these concerns in mind, the Court will turn to the merits of Judge McBryde's three separation of powers claims.

1. Whether the Act Endows the Judicial Branch with Powers More Appropriately Exercised by Other Branches (Count I)

At the heart of Judge McBryde's separation of powers argument is his contention that the Act impermissibly authorizes the Judicial Branch to exercise Congress's exclusive power to remove a sitting judge from office. Both the language of the Act and its legislative history, however, make it abundantly clear that the Judicial Branch is not so empowered. The Senate Judiciary Committee Report on the Judicial Council's Reform and Judicial Conduct and Disability Act of 1980 discussed this issue at length, carefully weighing contemporaneous suggestions that the Act's mechanisms might encroach on the impeachment power. *See* S.Rep. No. 96-362, at 4-6, *reprinted in* 1980 U.S.C.C.A.N. 4315, 4318-20. In response to concerns that removal of a sitting judge by any means other than impeachment would be unconstitutional, the statute was drafted to satisfy the "growing public demand for accountability" without interfering with the impeachment mechanism. *Id.* at 5. The language of the Act therefore expressly prohibits removal, providing that "in no circumstances may the council order removal from office of any judge appointed to hold office during good behavior." 28 U.S.C. § 372(c)(6)(B)(vii). As an additional safeguard against encroachment of the impeachment power, the remedial measures are narrowly drawn such that they may not effect the removal of a sitting judge from office. *See id.* § 372(c)(6)(B)(iv) (granting power to suspend new case assignments, but only "on a temporary basis for a time certain"); *id.* § 372(c)(6)(iii) (authorizing the judicial council to request retirement, but not to order it).

Considering a similar attack on the constitutionality of the

Act, the Eleventh Circuit rejected "the argument that the Act is unconstitutional because any measures which may place pressure on a judge constitute a form of removal from office by means other than by impeachment." *In re Certain Complaints,* 783 F.2d 1488, 1507 (11th Cir.1986) ("*Hastings II*"). Similarly, the Senate Judiciary Committee concluded that the Act creates a "supplement to, but not a substitute for, the seldom used process of impeachment." *Id.* at 3. Because the scope of its remedial measures does not extend to actual removal from office, the Act plainly does not usurp or encroach upon the Legislative Branch's exercise of the impeachment power. *See Mistretta,* 488 U.S. at 393, 109 S.Ct. 647 (approving the location of the Sentencing Commission within the Judicial Branch, in part, because it does not "trench upon the prerogatives of another Branch").

Judge McBryde's alternative "absence of power" argument is equally devoid of merit. In this regard, Judge McBryde adopts the views espoused by Justices Black and Douglas dissenting in *Chandler. See Chandler v. Judicial Council of the Tenth Circuit,* 398 U.S. 74, 135-37, 90 S.Ct. 1648, 26 L.Ed.2d 100 (1970) (arguing that the constitutional silence as to other means of judicial discipline should be interpreted as an absolute prohibition) (Douglas, J., dissenting). Whereas Justice Douglas concluded that "[u]nder the Constitution the only leverage that can be asserted against [a sitting judge] is impeachment," *id.* at 136, 90 S.Ct. 1648, the view that ultimately carried the day held that the "extraordinary machinery of impeachment" cannot be the only recourse in cases of alleged judicial misconduct involving intemperate or abusive behavior, *id.* at 85, 90 S.Ct. 1648. *See also Mistretta,* 488 U.S. at 387, 109 S.Ct. 647 (noting that *Chandler* specifically upheld the Congress's ability to vest in judicial councils authority to "make all necessary orders for the effective and expeditious administration of the business of the courts"); *Hastings v. Judicial Conference of the United States,* 593 F.Supp. 1371, 1380 (D.D.C.1984) (Gesell, J.) (finding that the judiciary has the "inherent power" to take reasonable disciplinary measures), *aff'd in part and vacated in*

part, 770 F.2d 1093 (D.C.Cir.1985) ("*Hastings I* ").[13] In *Hastings II,* the Eleventh Circuit determined that the Act's remedial measures do not "intrude upon Congress's sole power of removal or impeachment." 783 F.2d at 1509. Read together, *Chandler* and *Hastings II* stand for the proposition that Congress's impeachment power presents no obstacle to attempts to enforce reasonable rules of conduct via sanctions short of removal. *See Chandler,* 398 U.S. at 85, 90 S.Ct. 1648 (confirming the judiciary's inherent authority to put its "own house in order"); *Hastings II,* 783 F.2d at 1509; *Hastings I,* 770 F.2d at 1099. Impeachment may be the only means of removing a judge, but the Court agrees with the Defendants that it is not the only means by which a judge can be disciplined for judicial intemperance and despotic behavior not always susceptible to review by other means.

2. Whether the Act Threatens the Institutional Integrity of the Judicial Branch (Count III)

There can be no question that the independence of the judiciary is a "fundamental precept[ ] upon which our systems of government is founded." *Hastings I,* 770 F.2d at 1104 (Edwards, J., concurring). In the hallowed words of Alexander Hamilton, the "independence of the judges is ... requisite to guard the constitution and the rights of individuals [against legislative encroachments and] from the effects of those ill humors which the arts of designing men, or the influence of particular conjectures, sometimes disseminate among the people themselves." The Federalist No. 78, at 527 (A. Hamilton) (J. Cooke ed.1961). Indeed, the Supreme Court has stressed "the imperative need for total and absolute independence of judges in deciding cases or in any phase of the decisional function." *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648; *see also Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.,* 458 U.S. 50, 60, 102 S.Ct. 2858, 73 L.Ed.2d 598 (1982) (stating that the

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[13]On appeal, the bulk of Judge Gesell's decision was vacated on ripeness grounds, whereby the appellate court never reached its merits. Notwithstanding its lack of precedential authority, the Court shall occasionally cite to this opinion for its persuasive reasoning and thoughtful analysis of the merits of this issue.

Constitution "commands that the independence of the judiciary be jealously guarded, and ... provides clear institutional protections for that independence"). To that end, the Constitution guarantees that individual judges shall "hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office." U.S. Const. Art. III. § 1. These protections are counterbalanced to some extent by the impeachment power, which allows the Legislative Branch to remove judges from office under certain circumstances. *See id.*, art. I, §§ 2, 3. Together, these safeguards were designed to insulate the Judicial Branch--both the institution and the individual decision-makers that comprise it--from undue influence emanating from its coordinate Branches, while ensuring some degree of accountability.

Congress supplemented these constitutional measures almost immediately with various statutory limitations on the independence of individual judges. *See Hastings,* 593 F.Supp. at 1379 (providing examples of limitations placed on individual judges by the first Congress). Some examples curtailing particular activities include criminalization of bribery, Act of 1790, ch. 9, sec. 21, 1 Stat. 117; the recusal requirement, Act of May 8, 1792, ch. 36, sec. 11, 1 Stat. 278 (codified at 28 U.S.C. § 455); and the prohibition on the practice of law by judges, Act of December 18, 1812, ch. 5, 2 Stat. 788 (codified at 28 U.S.C. § 454). *See Hastings,* 593 F.Supp. at 1379. Over the years, as the Judicial Branch grew, its members came to recognize the need for "a statutory framework and power whereby they might 'put their own house in order.' " *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648. This goal was first realized in 1939 with the creation of the judicial councils and the Judicial Conference, the constitutionality of which "seems to be established." *Hastings I,* 770 F.2d at 1099. The Judicial Conduct and Disability Act represents the latest in this series of measures designed to protect the integrity of the judiciary as a whole by placing limits on the independence of individual judges. *See* In re *Petition to Inspect,*735 F.2d 1261, 1265-66 (11th Cir.1984) (finding the broad purposes of the Act to be preservation of the integrity of the judiciary, maintaining public confidence in the judicial

process, and strengthening judicial independence). The Act is unique among these measures, however, in that it places the onus on the Judicial Branch actively to police the conduct of its own members, a responsibility willingly assumed by the Judicial Branch when it collaborated with Congress in fashioning this legislation.

Judge McBryde maintains that judicial independence resides primarily in the unfettered autonomy of individual judges, and that this independence is fatally compromised by giving one judge power over another. The *Chandler* Court divided on precisely this question. Writing for the Court, Justice Burger apparently rejected the notion "that each judge in a complex system shall be the absolute ruler of his manner of conducting judicial business." *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648; *see Hastings II,* 783 F.2d at 1505 (reading *Chandler* "as rejecting any fixed notion ... that courts are mere collections of individual judges, each of whom is a complete law unto himself or herself."). Concurring in the judgment, Justice Harlan implicitly preferred institutional independence over individual independence when he specifically approved the judicial council's use of its statutory powers to remedy "what the Council members perceived as a threat to public confidence in the administration of justice." *Id.* at 125, 90 S.Ct. 1648. Judge McBryde's understanding of judicial independence, though, most closely approximates the dissenting views of Justices Black and Douglas, who would have held that the principle of judicial independence bars the judiciary from censuring or otherwise disciplining its own members. *See id.* at 136-38, 90 S.Ct. 1648. *Hastings II* characterized the difference between the *Chandler* majority and the dissenters as follows: "The key to the disagreement ... may well lie in the fact that whereas the dissenters saw the realm of judicial independence to be all-encompassing, the majority located a judge's protected independence more narrowly, 'in deciding cases or in any phase of the decisional function.' " *Hastings II,* 783 F.2d at 1506-07 (quoting *Chandler,* 398 U.S. at 84, 90 S.Ct. 1648). *Hastings II* went on to affirm that the judicial council's power to discipline "does not transgress the Constitution's vision of the independence of each Article III judge..... The judiciary could

hardly function if judicial councils were powerless to exercise powers of moral suasion or censure, where a judge is felt to be bringing discredit on the court through disability, infirmity, incompetence or misconduct." *Id.* at 1509; *see also* Harry T. Edwards, *Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges,* 87 Mich. L.Rev. 765, 784 (1989) (concluding that "individual judges are subject to some measure of control by their peers with respect to behavior or infirmity that adversely affects the work of the court and that does not rise to the level of impeachable conduct").

In light of these precedents, the Court rejects Judge McBryde's argument that judge-on-judge discipline is inherently unconstitutional.[14] As the framers of the 1990 amendments to the Act recognized, judicial independence and judicial accountability "are partners in maintaining the respect and confidence necessary to the effectiveness of the Federal judiciary." H. Rep. No. 101-512, at 8 (internal quotations omitted), *reprinted in* 1990 U.S.C.C.A.N. 6879, 6882. The Court concurs with Judge Gesell's observation that "the Framers never intended that the independence of any one officeholder, including judges, be so absolute as to threaten the integrity and orderly functioning of that officeholder's branch of government." *Hastings,* 593 F.Supp. at 1379. In order to answer the question of whether the Act erodes judicial independence, the Court must consider both the independence of individual judges and the independence of the judiciary as an institution.

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[14]This is not to suggest that the such a scheme is without the potential for abuse. As Judge McBryde forcefully contends, the Act could be used as a means of hazing judges whose views do not comport with those held by their colleagues. A full-blown investigation undoubtedly takes its toll on a subject judge in terms of time, money, and potential damage to reputation. Judge McBryde's claim that the Defendants have used the Act to undermine his independence will be analyzed in the context of his as-applied claims. For now, the Court simply notes that the mere *potential* for abuse does not render the Act facially invalid where its legitimate uses remain within constitutional bounds and it places no undue burden on judicial independence. *See Hastings II,* 783 F.2d at 1508 (balancing the personal pressures placed on a subject judge against institutional values of judicial independence).

See, e.g., Hastings II, 783 F.2d at 1509 (evaluating separation of powers challenge to the Act by balancing the pressure placed on individual judges against institutional values).

Ultimately, Judge McBryde's facial judicial independence challenge fails because the powers exercised by the Judicial Branch under the auspices of the Act are not incompatible with the central mission of that Branch. *See Mistretta,* 488 U.S. at 388, 109 S.Ct. 647. Rejecting a similar argument raised by Judge Hastings, the Eleventh Circuit wrote that the Act "does not ask judges to promote some interest lying outside the immediate concerns of the judicial branch, nor does their membership on investigating committees and judicial councils make them less impartial." *Hastings II,* 783 F.2d at 1504 (contrasting judicial participation in addressing allegations of judicial misconduct with judicial participation in fighting organized crime). To the contrary, *Hastings II* found that "the investigating judges here are concerned solely with matters affecting the management and reputation of the judiciary itself." *Id.* The most natural guardians of judicial independence are judges themselves, whose interests are most closely aligned with those of the subject judge. Judge Edwards' commentary underscores this point:

> Judges cherish the principle of judicial independence. Every judge understands that judicial independence would be lost if individual judges were allowed to be dominated by the group. If one individual must forfeit his or her independence, a precedent is established that will threaten every member of the group. Judges will not tolerate this; thus, no member of the group is likely to discipline another without great caution..... Overall, judges' naturally empathetic and disapproving impulses will blunt each other, leaving them as the best people, from a practical standpoint, to carry out the judicial policing function.

Edwards, *Regulating Judicial Misconduct,* 87 Mich. L.Rev. at 780. Indeed, no other Branch could perform this essential function without raising serious separation of powers objections. *Hastings II,* 783 F.2d at 1505. The integrity of the institution, with respect to both public trust and freedom from outside influence, can be preserved only if judges shoulder the difficult

responsibility of monitoring their own conduct. Judicial supervision fortifies judicial independence and thus must be entrusted only to the judiciary.

3. Whether the Act Allows Improper Exercise of Article III Power (Count II)

The third and final manifestation of Judge McBryde's facial challenge to the Act on separation of powers grounds is his argument that the Act authorizes administrative bodies within the Judicial Branch to sanction a judge because of disagreement with the merits of his or her rulings, effectively reversing his or her judicial decisions outside the constitutionally mandated confines of an Article III court. On its face, however, the Act clearly precludes review of a judge's judicial decisions. Section 372(c)(3) provides that the chief judge may dismiss a complaint "if he finds it to be ... directly related to the merits of a decision or procedural ruling." 28 U.S.C. § 372(c)(3)(A). Congress enacted this provision in order to "protect the independence of a judge in making decisions by precluding use of the complaint mechanism to collaterally attack rulings." *In re Complaint of Judicial Misconduct,* 37 F.3d 1511, 1515 (U.S.Jud.Conf.1994) (citing H.R.Rep. No. 96-1313, at 10 (1980)); *see also McBryde I,* 117 F.3d at 230 (finding that the Act prohibits review of the merits of judicial decision). This provision serves as an additional bulwark against incursions into the constitutionally protected sphere of judicial decision-making.

For this reason, the Act presents no facial violation of Article III's case and controversy requirement. In *Mistretta,* the Court squarely held that judges could serve on the Sentencing Commission even though the Commission's work did not involve the exercise of judicial power in the "constitutional sense of deciding cases and controversies." *Mistretta,* 488 U.S. at 389, 109 S.Ct. 647. The Court reached this conclusion in large part because it found that the responsibilities shouldered by the judges on the Commission were closely related to the central mission of the judiciary. *See id.* at 391, 109 S.Ct. 647. By the same token, there is nothing inherently objectionable about a group of judges acting in an administrative capacity to investigate and remedy "conduct prejudicial to the effective and expeditious administration of the business of the courts." 28

U.S.C. § 372(c)(1); *Hastings II,* 783 F.2d at 1506-07. As the Court commented in *Chandler,* albeit in dicta, "[w]e can see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the courts within (each) circuit.' " *Chandler,* 398 U.S. at 85 n. 7.

Having considered each of Judge McBryde's arguments that the Act is unconstitutional on its face because it upsets the balance of power among the three Branches, the Court concludes that the Act passes constitutional muster. The Act does not encroach upon Congress's impeachment powers, nor is it "preempted" by those powers. The tasks assigned to the judicial councils are essential to the central mission of the Judicial Branch, and could not be lodged elsewhere without occasioning grave concern. With the active assistance of the Judicial Branch, Congress painstakingly drafted the statute to avoid precisely these concerns. Judge McBryde has highlighted several areas where the Act's mechanisms could be used for nefarious purposes, but the potential for abuse is clearly outweighed by the Act's important role in preserving and protecting judicial independence. Upon close scrutiny, the Court concludes that Judge McBryde's claims that the Act violates the separation of powers doctrine are " 'more smoke than fire,' and do not compel us to invalidate Congress's considered scheme for resolving the seemingly intractable dilemma" of remedying judicial misconduct. *Mistretta,* 488 U.S. at 384, 109 S.Ct. 647.

B. Potential Limits on this Court's Jurisdiction

Before turning to the merits of Judge McBryde's remaining claims--which range from constitutional challenges to the validity of the Act as it was applied to him, to very specific claims that certain aspects of the investigation violated the Act and the Complaint Rules--the Court must first consider what limits, if any, the Act's finality clause, 28 U.S.C. § 372(c)(10), places on this Court's jurisdiction over Judge McBryde's claims. Section 372(c)(10) states in relevant part that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." The parties agree that this section does not

deprive the Court of jurisdiction to hear Judge McBryde's facial constitutional claims, but its application to Judge McBryde's as-applied and statutory claims is hotly contested. Relying on the Supreme Court's directive that "only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review," *see Abbott Laboratories v. Gardner,* 387 U.S. 136, 141, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967) (citations omitted), Judge McBryde suggests that the only aspect of the proceedings insusceptible to review is the Judicial Council's 1997 Order. The Defendants take a much broader view of the finality clause, arguing that it deprives this Court of jurisdiction to hear any non-constitutional claims or as-applied constitutional claims. In order to resolve this difficult issue, which will have a profound impact on the Court's resolution of Judge McBryde's remaining claims, the Court must consider the express language of the statute, "the structure of the statutory scheme, its objectives, its legislative history and the nature of the administrative action involved." *Block v. Community Nutrition Institute,* 467 U.S. 340, 345, 104 S.Ct. 2450, 81 L.Ed.2d 270 (1984).

On its face, the finality clause "expressly limits the availability of review of orders and determinations made under the Act." *Hastings I,* 770 F.2d at 1096. Section 372(c)(10) defines a narrow universe of options for a complainant, judge, or magistrate aggrieved by decisions rendered during the course of a § 372(c) proceeding. *See* 28 U.S.C. § 372(c)(10). If a complainant, judge, or magistrate is aggrieved by a final order of the chief judge, he or she may petition the judicial council of the circuit for review. *See id.* Similarly, a person aggrieved by an action of the judicial council may petition the Judicial Conference for review. *See id.* Aside from those enumerated avenues of redress, the finality clause declares that "all orders and determinations, including denials of petitions for review, shall be final and conclusive and shall not be judicially reviewable on appeal or otherwise." *Id.*

At the motions hearing, counsel for Judge McBryde urged the Court to take a very narrow view of the phrase "orders and determinations" as it is used in the finality clause. *See* Transcript of June 11, 1999 Hearing at 43-47 ("Tr."). According

to Judge McBryde, the "orders" covered by the finality clause are those orders issued by the Judicial Council pursuant to § 372(c)(6); "determinations" refer to determinations by the judicial council that a subject judge's conduct might constitute grounds for impeachment or is not amenable to resolution by the judicial council, *see* § 372(c)(7)(B), or a determination by the Judicial Conference that consideration of impeachment is warranted, *see* § 372(c)(8). Taking this argument to its logical conclusion, the phrase "orders and determinations" would encompass only the Council's December 31, 1997 Order. All other aspects of the § 372(c) proceedings would be subject to review, including the findings contained in the Special Committee's Report and the Review Committee's September 18, 1998 Order.

Assuming that Judge McBryde is correct as a matter of statutory interpretation, his desired result--de novo review of the Special Committee's report--does not necessarily follow. The Judicial Council's 1997 Order adopted "by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations." Admittedly, the Council did so only "to the extent relevant to the action taken below," which qualification renders it impossible to discern the precise basis for the Order. But the fact remains that the finality clause leaves all aspects of the Order "final and conclusive." The Court cannot "question the wisdom" of the Special Committee's Report, as Judge McBryde urges, without questioning the wisdom of the Judicial Council's Order, which Judge McBryde concedes is not subject to judicial review. Judge McBryde's suggested approach would require the Court to revisit all of the testimony and all of the exhibits that were considered by the Special Committee during several weeks of hearings, adopted by a clear majority of the Judicial Council, and ultimately affirmed by the Review Committee. Needless to say, this course of action would completely eviscerate the finality clause. Even if Judge McBryde is correct that the phrase "orders and determinations" does not directly encompass the Special Committee's Report because it is neither an order nor a determination, the plain language of the statute renders the Special Committee's findings

binding on this Court by virtue of the Judicial Council's unreviewable Order adopting those findings.

The few reported decisions construing the finality clause have done so in dicta, *see, e.g., McBryde II,* 120 F.3d at 520 n. 1 (noting in passing that any arguments "concerning dismissal of Judicial Conference proceedings should be directed to that body and not to this court"), or their continuing validity is called into question by subsequent decisions, *see, e.g., Hastings,* 593 F.Supp. at 1377-78 (affirmed in part and vacated in part by later *Hastings* decisions). Although this Court may not technically be bound by these decisions, the weight of the authority suggests that the finality clause should be interpreted broadly to preclude judicial review of all claims that do not rise to the level of constitutional challenges. In Judge Gesell's *Hastings* decision, for example, he examined the language of the clause, the legislative history, and various Supreme Court precedents, and concluded that Congress had intentionally established an "absolute bar against judges under inquiry seeking judicial review of actions taken against them pursuant to the Act." *Hastings,* 593 F.Supp. at 1378. In the same vein, the Fifth Circuit noted that "Congress has made crystal clear its intent that the federal courts as such exercise no appellate jurisdiction" over claims arising out of § 372(c)(10) proceedings. *See McBryde I,* 117 F.3d at 220 n. 7; *see also McBryde II,* 120 F.3d at 523 (finding that § 372(c)(10) "unambiguously forecloses judicial review" of the Judicial Conference's orders and determinations). *But see Hastings I,* 770 F.2d at 1109 (Edwards, J., concurring) (commenting that the scope of § 372(c)(10) is ambiguous). At the same time that they militate against judicial review, however, these cases also make clear that the finality clause is no bar to review of *constitutional* challenges to the Act. *See Hastings,* 593 F.Supp. at 1378 (holding that "the Act does not bar judicial review of the facial validity of the statute itself"); *see also Hastings I,* 770 F.2d at 1109 (Edwards, J., concurring) (raising questions about any interpretation of § 372(c)(10) that would bar constitutional claims); *Hastings III,* 829 F.2d at 108 n. 69 (on the question of whether the court could hear plaintiff's due process challenges to the Act as-applied, noting that "sensitive and unsettled questions of

constitutional law would arise if the challenged actions are covered by the prohibition on judicial review"). On balance, the Court finds that the finality clause must be construed so as to bar Judge McBryde's statutory claims while preserving his right to challenge the constitutionality of the Act, both on its face and as it was applied to him by the Defendants.

Notwithstanding the foregoing analysis, Judge McBryde maintains that the Court has jurisdiction to hear his non-constitutional claims to the extent that the Defendants exceeded their delegated powers or acted "contrary to a specific prohibition in the Act." *Leedom v. Kyne,* 358 U.S. 184, 188, 79 S.Ct. 180, 3 L.Ed.2d 210 (1958). *Leedom v. Kyne* considered the question of whether the district court had jurisdiction of an original suit to vacate an otherwise unreviewable determination made by the National Labor Relations Board, where there was no dispute that the Board's determination was made in excess of its statutory powers. *See id.,* 358 U.S. at 185, 79 S.Ct. 180. The Court held that the district court did have jurisdiction to hear the suit, distinguishing between claims that the Board had acted in excess of its delegated powers or contrary to a specific prohibition in the National Labor Relations Act and suits to "review" a decision of the Board as such. *See id.* at 188, 79 S.Ct. 180. Because the Board had attempted to exercise a power that Congress had specifically withheld, the Court reasoned that the district court should have jurisdiction of an original suit in order to prevent deprivation of the plaintiffs' statutory rights. *See id.* at 189, 79 S.Ct. 180.

In *Dart v. United States,* 848 F.2d 217 (D.C.Cir.1988), this Circuit clarified that the *Leedom v. Kyne* exception is available only to review *facial* violations of a given statute. *See Dart v. United States,* 848 F.2d at 231. Like § 372(c)(10), the finality clause at issue in *Dart* provided that "[t]he order of the Secretary shall be final and is not subject to judicial review." 50 U.S.C. § 2412(c)(1) (Supp. III 1985). The plaintiff maintained that he was entitled to judicial review of the Secretary's decision despite the finality clause because the Secretary had exceeded his statutory authority. Without examining the underlying decision on its merits, the *Dart* court concluded that the contested order violated the relevant statute "on its face." *Dart,*

848 F.2d at 231. *Dart* cautioned, however, that the *Leedom v. Kyne* exception for review of facial violations must "remain narrow":

> Congress' finality clause must be given effect, and an agency action allegedly "in excess of authority" must not simply involve a dispute over statutory interpretation or challenged findings of fact.... [T]he invocation of *Leedom v. Kyne* jurisdiction is extraordinary; to justify such jurisdiction, there must be a "specific provision of the Act which, although it is clear and mandatory, was nevertheless violated."

Dart, 848 F.2d at 231 (internal citations and quotations omitted). Mindful of the Supreme Court's admonition that courts "cannot lightly infer that Congress does not intend judicial protection of rights it confers against agency action taken in excess of delegated powers," *Leedom v. Kyne,* 358 U.S. at 190, 79 S.Ct. 180, this Court must consider whether Judge McBryde has demonstrated the sort of facial statutory violation contemplated by *Dart.*

Judge McBryde contends that the Defendants committed two such statutory violations. First, Judge McBryde charges that Committee imposed sanctions upon him that were improperly based on evidence not pertaining to any of the five official complaints before the Special Committee. Tr. at 56. Second, he claims that the Defendants exceeded the "jurisdictional mandate of the statute ... by reviewing Judge McBryde's decisions and punishing him for those decisions." Tr. at 55.

1. Expanded Scope of the Investigation

The section 372(c) proceedings found their genesis in a series of five complaints concerning Judge McBryde. Of the five complaints, four were identified by Chief Judge Politz. *See* 28 U.S.C. § 372(c)(1) (authorizing the chief judge to "identify" a complaint in lieu of a written complaint filed with the clerk of the court of appeals). Chief Judge Politz established the Special Committee to investigate these complaints, *see id.* § 372(c)(4)(A) (appointment of the special committee by the chief judge), and the Special Committee elected to expand the scope of the investigation into broader areas of concern suggested by the five complaints, *see id.* § 372(c)(5) (permissible scope of the

special committee's investigation). Judge McBryde maintains that the Council's sanctions and public reprimand arose out of this "unbridled investigation," rather than out of a finding that any of the five complaints was meritorious. *See* Pl.'s Stmt. at 39. As Judge McBryde views it, these deficiencies render the entire process flawed.

The problem with Judge McBryde's argument is that the Act contains no such limitations on the Special Committee's power to expand the scope of the investigation, nor does it mandate that the Judicial Council's remedial actions be based on a meritorious complaint. Section 372(c)(4)(A) clearly empowers the special committee to "conduct an investigation as extensive as it considers necessary." 28 U.S.C. § 372(c)(4)(A).[15] The report that the special committee prepares must include the "findings of the investigation" and "recommendations for appropriate and necessary action by the judicial council of the circuit," but "findings on the complaint" are not a prerequisite to judicial council action under § 372(c)(6). *See id.* §§ 372(c)(5), (c)(6). In addition, the Act specifically authorizes the Chief Judge to "identify" a complaint. *See id.* § 372(c)(1). Neither the identification of the complaints nor the expanded scope of the investigation were clearly in excess of the Defendants' statutory authority, therefore they cannot be used to invoke *Leedom v. Kyne* jurisdiction. *See Dart,* 848 F.2d at 231.

2. "Merits-Relatedness"

Judge McBryde's contention that the Defendants reviewed the merits of his judicial decisions and punished him for disagreement with his judicial philosophy recurs throughout his complaint. In the context of his as-applied separation of powers claims, this theory supports his argument that the Defendants impermissibly exercised Article III powers, as well as his assertion that the proceedings compromised his judicial independence. His statutory claims are also predicated on this characterization of the Judicial Council's order. As a matter of

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[15]Complaint Rule 9(A) is not to the contrary: it also permits the special committee to expand the scope of its investigation "[i]f the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint." *See* 5th Cir. Compl. R. 9(A) (Pl.'s Ex. 143).

immediate concern, the Court must assess the availability of *Leedom v. Kyne* jurisdiction to review Judge McBryde's non-constitutional claims, but the answer to this question will also substantially shape the Court's approach to Judge McBryde's remaining claims. The threshold inquiry is whether the scope of the Defendants' investigation and the basis for the remedial measures they imposed on Judge McBryde crossed the line into the protected sphere of judicial decision-making. If so, the Court must determine whether this transgression violates a clear and mandatory provision of the Act.

The vast majority of the evidence presented to the Special Committee consisted of testimony pertaining to how Judge McBryde behaves when he conducts trials and other proceedings, and how Judge McBryde interacts, both formally and informally, with attorneys, judges, and other courthouse personnel. The Special Committee digested this evidence and determined that the reported incidents "bespeak several alarming patterns of conduct exhibited by Judge McBryde over the course of his tenure on the bench." Special Committee Report at 124. Five broad tendencies emerged, all of which combined to paint Judge McBryde as a jurist plagued by intemperance, abusiveness, and a profound lack of collegiality. On the strength of the Special Committee's Report, Findings of Fact, and Recommendations, which the Council adopted "[t]o the extent relevant below," the Council issued its 1997 Order and Public Reprimand. *See* 1997 Order.

When Judge McBryde petitioned the Review Committee for relief from the Judicial Council's Order, one of the central themes of his petition was that essentially all of the conduct for which the Council had sanctioned him directly related to the merits of a decision or procedural ruling. *See* Review Committee's 1998 Order at 15. Judge McBryde argued to the Review Committee, as he argued to the Special Committee and as he argues in the case at bar, that a judge cannot be sanctioned for a pattern of allegedly improper rulings any more than he or she can be sanctioned for a single allegedly improper ruling. While affirming Judge McBryde's basic position that it would not be permissible to sanction a judge based on disagreement with the merits of his rulings, both the Special Committee and

the Review Committee soundly rejected Judge McBryde's contention that the Special Committee and the Judicial Council had violated this rule. The Review Committee reasoned as follows:

> Although a judge indeed may not be sanctioned out of disagreement with the merits of his rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act.... To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is *not* to say that a judge's rulings themselves may be challenged under the Act.

Id. (emphasis in original); *see also* In re *Complaint,* 37 F.3d at 1515 (finding that "the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not related to the merits of rulings that arises in the course of the performance of judicial duties"). Distinguishing the complaints against Judge McBryde from numerous other complaints that were packaged as conduct-related but dismissed as merits-related, the Review Committee found that "the claims of improper conduct were supported by considerable substance" evidencing judicial intemperance and abusive behavior. Review Committee Order at 17.

The Review Committee's analysis reflects deep respect for the important distinction between the merits of a judicial decision and the conduct of the judge rendering that decision. Although the line between merits and conduct is "not always easily found," *McBryde I,* 117 F.3d at 230, courts have been able to draw a meaningful distinction between legal or factual determinations, on the one hand, and a judge's courtroom demeanor, on the other hand. In *McBryde I,* for example, the Fifth Circuit concluded that the Judicial Council had ventured into forbidden territory by removing two cases from Judge McBryde's docket after he made certain controversial credibility determinations. *See id.* (citing *United States v. Washington,* 98 F.3d 1159, 1165 n. 1 (9th Cir.1996) (stressing that the judicial

council cannot address matters that might be raised through normal channels of appellate review)). Although the Judicial Council ostensibly acted to remedy "judicial misconduct," the Fifth Circuit found that the Judicial Council had in fact sanctioned Judge McBryde based on the merits of his decisions. The court noted, however, that a different outcome might result if there were " 'any indication of a broader pattern of conduct evidencing incapacity, arbitrariness, or neglect of office.' " *Id.* at 230 (quoting In re *Charge of Judicial Misconduct,* 613 F.2d 768, 769 (9th Cir.1980)).

The Judicial Conference of the United States has recognized that its own limited jurisdiction excludes specifically legal or constitutional questions. *See* In re *Complaint of Jud. Misconduct, No. 84-372-001,* Jud. Conf. of the U.S., at 6 (stating that "[w]e have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of the accused judge .... We are not a court."). On numerous occasions, circuit judicial councils have dismissed complaints which essentially challenge the merits of judicial rulings. For instance, the First Circuit Judicial Council dismissed a complaint alleging misconduct on the part of a judge on the grounds that it "directly related to the merits of decisions or procedural rulings of the judge complained against." In re *Complaint No. 157* at 2, Aug. 4, 1994 (citing 28 U.S.C. § 372(c)(3)(A)(ii)). In that instance, unlike those that emerged out of the investigation into Judge McBryde's behavior, the complaint suggested that the judge harbored improper animus against the complainant without providing any "factual support whatsoever, beyond the allegedly erroneous rulings themselves, to suggest that the judge may have acted with any improper motivation." *Id.* Similarly, when an attorney filed a section 372(c) complaint against a district court judge protesting that the judge had issued an erroneous judgment holding the complainant personally liable for a large sum of money as reimbursement for attorneys fees, the First Circuit Judicial Council dismissed the complaint. *See* In re *Complaint No. 159,* Sept. 7, 1994, at 4. Although conceding that the judgment was indeed erroneous, the Judicial Council wrote that "Complainant's proper recourse to challenge these rulings was

by way of motion in the district court and, if necessary, appeal to the court of appeals, not by way of a complaint of judicial misconduct under § 372(c)." The Judicial Council recognized that it lacked jurisdiction over a complaint "directly related to the merits of decisions or procedural rulings." *Id.* at 2.

Dismissing one complaint, the Fourth Circuit Judicial Council noted that "[i]t is not proper to utilize the Act if other suitable judicial remedies are available ...." That Judicial Council again dismissed a complaint that sought the recusal of a judge from a particular case. The complainant based the request for recusal on a colloquy between the judge and counsel in which the judge "challenged the strength of the positions articulated by complainant...," and a later settlement discussion in which the judge used strong language to express doubt about complainant's assessment of the damages potential of his claim. *See* In re *Complaint No. 121,* Mar. 12, 1993. The Council emphasized that a judge "is accorded wide latitude to comment on a case in colloquy with counsel and the parties in managing the pursuit of litigation." *Id.* at 2. Mere comments that appear to challenge the merits of a claim or its monetary value do not rise to the level of judicial misconduct as contemplated by the Act.

Just as a body constituted under section 372(c) is not the appropriate forum to review the merits of decisions or procedural rulings, a court of appeals is not the appropriate forum to monitor and redress a judge's broad course of conduct consisting of abusive and intemperate behavior, unless it affects the merits in a given case. For example, the Fifth Circuit Court of Appeals reviewed the legal disposition of several cases in which Judge McBryde conducted himself so offensively that his actions ultimately came before the Special Committee. *See, e.g., Dawson v. United States,* 68 F.3d at 886; *Van Waeyenberghe,* 990 F.2d at 845. Although both the *Dawson* and the *Van Waeyenberghe* courts remarked upon certain aspects of Judge McBryde's conduct, these remarks remained peripheral to the opinions and finally irrelevant to the legal resolution of the cases. Additionally, while a court of appeals may review a lower court's legal conclusions and a given judge's conduct in isolated instances, a judicial council is able to examine a judge's course of conduct as it ranges over many interactions.

Therefore, contrary to Judge McBryde's assertion, appellate review is not always an adequate means of addressing this problem. Consider the interaction between judge and attorney: A judge's treatment of an attorney may not affect the outcome of a particular case or pending motion, thereby insulating it from review, and yet have a profound effect on the efficacy of the attorney's representation. The Special Committee heard evidence that Judge McBryde's courtroom conduct prevented some attorneys from building a record that would preserve their client's rights on appeal. In a smaller legal community, the impact of such intangible conduct is magnified, and yet the court of appeals can only rectify those instances that rise to the level of reversible error in a specific case. When the appellate court considered the merits of Judge McBryde's decisions, apart from an occasional remark about Judge McBryde's manner of dealing with the issue or attorney at hand, the court did not address a course of conduct involving multiple instances over many cases in which Judge McBryde's behavior reflected an abusive pattern.

Upon review of the Special Committee's Report, the Court finds that the Judicial Council did not repeat the mistakes that it made in *McBryde I*. Based on extensive testimony from witnesses regarding their experiences with Judge McBryde, the Special Committee identified certain patterns of conduct that prevented attorneys from zealously representing their clients. Rather than focusing on any one isolated event, the Special Committee examined a series of incidents and found, based on the totality of the circumstances, that Judge McBryde's conduct was having a deleterious effect on the entire legal community. *See* Report at 49-50. Significantly, there is no indication on the record that the Defendants or witnesses were motivated by ideological or political differences with Judge McBryde; the witnesses represented the entire legal community, including public defenders, prosecutors, private practitioners, and fellow jurists, and the conduct under scrutiny is not susceptible of any political categorization. Admittedly, some of the incidents that witnesses described were more egregious than others. Indeed some of the testimony was favorable to Judge McBryde. But looking at the Special Committee's conclusions on their face,

see Dart, (emphasizing that the Court is not to engage in factual disputes or matters of statutory application), the Court perceives no question that these conclusions emerged out of the Special Committee's assessment that the overall impact of Judge McBryde's conduct had far-reaching consequences that extended beyond the legal community to the general public.[16]

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[16]A pattern of conduct such as Judge McBryde has demonstrated raises profound concerns regarding not only the Fort Worth legal community, but also the American legal profession more generally. The question of civility and its regrettable decline among members of this profession has emerged as a major topic of concern among lawyers, judges, and legal scholars. *See, e.g.,* Symposium, *One Response to the Decline of Civility in the Legal Profession: Teaching Professionalism in Legal Research and Writing,* 51 Rutgers L.Rev. 889 (1999); Hon. Alva Hugh Maddox, *Lawyers: The Aritstocracy of Democracy or "Skunks, Snakes, and Sharks"?* 29 Cumb. L.Rev. 323 (1998-99); Hon. Marvin E. Aspen, *The Judiciary--New Issues and New Visions: Promoting Civility in Litigation,* 40 Fed. B. News & J. 496 (1993); ABA Comm. on Professionalism, *"In the Spirit of Public Service": A Blueprint for the Rekindling of Lawyer Professionalism,* 112 F.R.D. 243 (1986). Many of these commentators have lamented the apparent lack of civility in the world of politics, and have noted the same trend in that of law. As Justice Anthony Kennedy reminded us, "[c]ivility has deep roots in the idea of respect for the individual ... respect [for] one another's human aspirations and equal standing in a democratic society." Justice Anthony M. Kennedy, *Address to 1997 ABA Ann. Meeting* (Summer, 1997, San Francisco, CA).

If incivility among lawyers threatens to bring the entire legal profession into disrepute, then a lack of civility in the judiciary promises to undermine profoundly American society's respect for the rule of law and its faith in the possibility of achieving just results. Chief Justice Warren Berger admonished his judicial colleagues almost thirty years ago: "Every judge must remember that no matter what the provocation, the judicial response must be judicious response and that no one more surely sets the tone and the pattern for courtroom conduct than the presider." Warren E. Burger, *The Necessity for Civility,* 52 F.R.D. 211, 215 (1971) (Text of speech delivered at the Opening Session, American Law Institute, May 18, 1971, Wash. D.C.). Judges occupy a unique, and uniquely powerful, role in American society; thus, when they behave toward attorneys (or litigants) in an intemperate, contemptuous, and arbitrary manner, the consequences extend beyond the immediate target of their actions. As Judge Louis Pollak, former law school dean and American Bar Association section chair, wrote: "when the target of a judge's unjustified polemic is a lawyer practicing in the judge's court--the

As a result, *Leedom v. Kyne* does not provide a basis for overriding the clear dictate of the finality clause.

3. The Non-Constitutional Claims

Judge McBryde's non-constitutional claims can be briefly summarized as follows. As described above, Judge McBryde claims that the Judicial Council exceeded its jurisdiction by reviewing the merits of his judicial decisions and procedural rulings, and by taking remedial actions based on the expanded investigation rather than the original five complaints (Count V). In support of his request for a writ of mandamus (Count VII), Judge McBryde argues that all five of the official complaints should have been dismissed because they were outside the scope of the Judicial Council's jurisdiction and unsupported by the evidence. Judge McBryde's primary argument that the Judicial Council violated the Act and the Complaint Rules (Count IV) essentially replicates his arguments in favor of mandamus and that the Judicial Council exceeded its jurisdiction: he contends that the complaints and the factual basis for the orders were merits-related, and that the Special Committee's findings do not support the Judicial Council's conclusion that Judge McBryde's conduct is prejudicial to the effective and expeditious administration of justice.[17] Based on the foregoing analysis of the finality clause, however, all three of these claims must be dismissed for lack of subject matter jurisdiction.

C. As-Applied Constitutional Claims

Having determined that the finality clause bars review of Judge McBryde's non- constitutional claims, the Court turns next to the as-applied constitutional claims. These include the remaining portion of Judge McBryde's separation of powers claims (Counts I, II and III) and his denial of due process claim

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harm to civility may be even more serious. This for the reason that the judge, speaking from a privileged sanctuary, is acting the bully and dishonoring the robe." Hon. Louis H. Pollak, *Professional Attitude,* A.B.A. J., Aug. 1998, at 66, 67. Indeed, the Act recognizes that a judge's conduct, if gratuitously abusive, is likely to exercise a pernicious influence upon the morale and efficacy of the legal profession and the administration of justice.

[17]The Court notes that all of these arguments were considered and found to be without merit by the Review Committee.

(Count VI). To some extent, these claims are coextensive with issues that have already been addressed or issues that are precluded by the finality clause. As for the remainder of Judge McBryde's as-applied claims, the Court finds that, with the exception of his First Amendment Claim, they are without merit.

1. Separation of Powers

The main thrust of Judge McBryde's claim that the Act is unconstitutional as it was applied to him is that "[h]e has been punished, and his judicial status has been altered, because of disagreements with the merits of his rulings and decisions ... [and] he has been subjected to a 'temporary impeachment.' " Pl.'s Stmt. at 5 (quoting *United States v. Avilez-Reyes,* 160 F.3d 258, 262 (5th Cir.1998) (Jones, J., dissenting)). Because the Court has already declined to adopt Judge McBryde's characterization of the Special Committee's Report, *see supra* II.B.2, there is no need to revisit his contention that the Defendants unconstitutionally interfered with his judicial independence by punishing him based on disagreements with his judicial philosophy or the merits of his rulings. Furthermore, Judge McBryde was not technically removed from office; his salary was not diminished, his judicial powers remain intact, and he has continued to decide cases and controversies. Thus, a constitutional violation will lie only if the remedial sanctions effectively removed Judge McBryde from office or significantly diminished his judicial independence.

Judge McBryde's public reprimand did not effect a removal from office, nor did it interfere with the protected sphere of judicial decision-making. Judges, like other public officials, frequently become targets of public criticism for their actions. Although the spirit of collegiality tends to shield judges from criticism from within the Judicial Branch, such criticism is not unheard of and has never been thought to create a problem of constitutional dimensions. Certainly, the public reprimand carried the added sting of the Judicial Council's imprimatur, but the Court sees no reason why the official stamp of the Judicial Council renders the reprimand unconstitutional.

Unlike the public reprimand, the assignment order and the disqualification order had a direct impact on Judge McBryde's docket. The assignment order interrupted the usual stream of

new cases for a period of one year, and the disqualification order prevents Judge McBryde from participating for a period of three years in any cases involving attorneys who took part as witnesses or prospective witnesses in the Special Committee's hearings. These measures are certainly more tangible, but their impact still does not approximate removal. Judge McBryde's caseload plummeted over the course of the year as a result of the assignment order, but neither his existing docket nor his power to manage it as he saw fit was impaired.[18] The disqualification order had a somewhat further reach,[19] but that order was both necessary and appropriate given the risk that Judge McBryde might engage in retaliation against witnesses and others. Both aspects of the Judicial Council's order were limited in scope, and tailored to the problem at hand. The Court is persuaded by the Defendants' arguments that all three aspects of the Judicial Council's order were constitutional.

2. Due Process

Judge McBryde enumerates a series of due process violations that purportedly infected each stage of the proceedings against him. The Court shall consider these alleged infringements of his due process rights by organizing them into three categories: (1) procedural irregularities; (2) structural defects; and (3) improper motives. Under the first category, he contends that the Special Committee engaged in "an illegal investigation" by broadening its review of Judge McBryde's activities beyond the purview of existing complaints against him. *See* Pl.'s Mot. Summ. J. at 98-99 ("[C]ounsel for the Special Committee combed the Fort Worth legal community for ammunition to further the goal of reviewing Judge McBryde's entire judicial career."). Moreover, Judge McBryde alleges that

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[18]Some jurists have expressed concern that suspension might become equivalent to removal if it extended for an inordinate amount of time, *see e.g., Hastings I,* 770 F.2d at 1108-09 (Edwards, J., concurring) (using fifteen years as the benchmark), but a one-year suspension does not implicate these concerns.

[19]As a result of this order, thirty-three of the cases on Judge McBryde's docket were reassigned to other judges.

he was denied adequate notice, having received the Special Committee's 159-page report a mere twelve days before the Judicial Council's December 17 meeting, and that he was the victim of a "rush to judgment" on the Judicial Council's part. In both of these respects, he maintains, he suffered a violation of his due process rights. *See id.* at 99-101. Finally, Judge McBryde complains that the Special Committee and the Judicial Council deprived him of his constitutionally mandated right to a fair hearing by permitting, and then predicating judgment upon, hearsay testimony, gossip, polls, rumor, and "local knowledge." *See id.* at 105-08.

In addition, Judge McBryde argues that certain structural defects in the division of labor between the various entities constituted to investigate, adjudicate, and review the merits of the complaints against him amounted to an unconstitutional deprivation of due process. Under this rubric, Judge McBryde points to the deference accorded by the Judicial Council to the Special Committee's findings, and in turn the deference accorded by the Review Committee to the Judicial Council's judgment. *See id.* at 101-05. ("The Review Committee deferred to the judgment of the Council, which had deferred to the Report of the Committee. No entity with authorization under the Act to decide Judge McBryde's fate made a reasoned decision."). In a related vein, Judge McBryde asserts that the proceedings, particularly the dual service of four Special Committee members as participants in the Judicial Council, applied the Act impermissibly to combine investigative and adjudicative functions. *See id.* at 114-16.

Finally, Judge McBryde impugns the motives of several judges who served on the various bodies involved in the proceedings. He maintains, as an initial matter, that the actions taken against him issued out of a retaliatory motive, and thus were riddled with vindictiveness. *See id.* at 110-14. Judge McBryde also levels the quite serious charge that bias and prejudice on the part of the investigating and adjudicating officials poisoned the proceedings against him, thereby depriving him of an impartial tribunal. *See id.* at 108-10.

Both Defendants and the United States have argued that, because he raised most of these allegations in great detail and at

great length before the Review Committee of the Judicial Conference, and because the Review Committee dismissed them in its September 18, 1998 Order, Judge McBryde is effectively precluded from raising issues relating to alleged procedural errors and unfairness in the context of the Special Committee hearings and the Judicial Council's judgment. *See, e.g.,* Def.'s Mem. Opp. Pl.'s Mot. Summ. J. at 21. Defendants have maintained throughout this action that the finality clause deprives this Court of jurisdiction over many of the grievances Judge McBryde has raised regarding the investigatory and, ultimately, disciplinary process he endured in response to complaints about his abusive behavior. If, as Defendants maintain, section 372(c)(10) prohibits this Court from hearing the allegations that Judge McBryde presented to the Review Committee, albeit in a different form, then for the Court to render a decision with respect to any of these allegations would be for the Court to transgress its Article III function by issuing an advisory opinion. *See* U.S. Const. Art. III § 2 (conferring jurisdiction over cases and controversies).

At the motions hearing, however, counsel for Defendants conceded that "Judge McBryde can make an as-applied constitutional challenge, but he has to make it in the context of the findings of the special committee and the council as affirmed by the review committee." Tr. at 50. This rather circular logic promises to yield absurd results. If the Court found this logic persuasive, it would retain jurisdiction over Judge McBryde's claims only to the extent they do not conflict with either the findings of the Special Committee and Judicial Council, or the reasoning of the Review Committee. In effect, Judge McBryde would be precluded from raising his due process challenges with respect to all claims that received attention at those earlier stages; yet Judge McBryde wishes precisely to challenge aspects of those earlier proceedings on constitutional grounds. While Judge McBryde raised numerous allegations of procedural unfairness and violations of both the Act and the Fifth Circuit Complaint Rules before the Review Committee,[20] these did not expressly implicate constitutionally

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[20]Rule 9(A) of the Rules Governing Complaints of Judicial

mandated rights. As the Court concluded above in its discussion of the finality clause, Judge McBryde may bring his claims challenging the constitutionality of the Act both on its face and as applied to him, including those alleging procedural flaws of constitutional magnitude. *See supra* section B.

The Court is mindful that, as the Supreme Court wrote over three decades ago, "[d]ue process of law is the primary and indispensable foundation of individual freedom. It is the basic and essential term in the social compact which defines the rights of the individual and delimits the powers which the state may exercise." *In re Gault,* 387 U.S. 1, 19-20, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967). The rules that govern adversarial proceedings are the "instruments of due process which enhance the possibility that truth will emerge from the confrontation of opposing versions and conflicting data. 'Procedure is to law what "scientific method" is to science.' " *Id.* at 21, 88 S.Ct. 55. Time and again the Supreme Court has emphasized that, at minimum, the Due Process Clause requires notice and an opportunity to be heard. *See, e.g., Cleveland Bd. of Ed. v. Loudermill et al.,* 470 U.S. 532, 541, 105 S.Ct. 1487, 84 L.Ed.2d 494 (enunciating basic requirements where individual stands to be deprived of significant property interest, here public employment); *Morrissey et al. v. Brewer,* 408 U.S. 471, 489, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972) (listing the minimum due process requirements for parole revocation, to wit: (1) written notice of the claimed parole violations; (2) disclosure of the evidence against the parolee; (3) opportunity to be heard and to present witnesses and evidence; (4) right to confront and to cross- examine adverse witnesses; (5) a "neutral and detached" hearing body; (6) and a written statement by the factfinders

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Misconduct or Disability provides in full:

> Each special committee will determine the extent of the investigation and the methods to be used. It the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge.

5th Cir. Compl. R. 9(A) (Pl.'s Ex. 143).

documenting evidence relied on and their reasoning); *In re Ruffalo,* 390 U.S. 544, 551, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968) (construing state disbarment proceedings as "adversary proceedings of a quasi-criminal nature," and therefore as requiring notice and an opportunity to be heard). As these and other Supreme Court cases make evident, "due process is flexible and calls for such procedural protections as the particular situation demands. Its flexibility is in its scope once it has been determined that some process is due; it is a recognition that not all situations calling for procedural safeguards call for some kind of procedure." *Morrissey,* 408 U.S. at 481, 92 S.Ct. 2593.

According to these precedents, then, Judge McBryde was undeniably afforded the most basic elements of due process. Thus, while the Supreme Court has on numerous occasions and in a variety of contexts enunciated minimum standards of constitutionally required due process, such discussions offer this Court no yardstick by which to measure, for example, precisely how much notice or how extensive an opportunity to be heard someone in Judge McBryde's position merits. Nor, for that matter, do the parties offer the Court any basis upon which to draw finer distinctions with respect to Judge McBryde's exact entitlements or the absence thereof. Accordingly, the Court shall evaluate each of Judge McBryde's due process claims with an eye toward all of the circumstances surrounding the investigation and adjudication of the complaints against him.

a. Procedural Irregularities

In arguing that the Special Committee conducted an "illegal investigation" by broadening its scope beyond the specific incidents alleged in the five original complaints, Judge McBryde essentially dresses up a rules violation claim as a deprivation of constitutional due process. Although his counsel objected to the Special Committee's "roving" investigation, the Special Committee continued to gather witnesses and incidents that established a pattern of conduct on Judge McBryde's part in anticipation of its upcoming hearings. *See* Pl.'s Mot. Summ. J. at 98-99; *see also* September 18, 1998 Order at 7-10. Judge McBryde points to no specific procedural rights of which this expansion deprived him, but rather characterizes it rather

generically as "illegal." Assuming that an expansion of its investigation would be illegal, however, it ran contrary not to constitutional guarantees but rather to the mandates of section 372(c)(5) and Rule 9(A) of the Fifth Circuit Complaint Rules. While this expansion was not in itself a due process violation, the Court has also determined above in Section B that the Special Committee did not exceed its statutory authority.

In this regard, only Judge McBryde's claim that he received inadequate notice of this expansion, along with the additional charges and witnesses it entailed, implicates constitutional guarantees of due process. While this Court is not bound by the Review Committee's determinations with respect to Judge McBryde's constitutional claims, the Court finds the Review Committee's analysis of this issue persuasive. Although the notice Judge McBryde received regarding the precise contours of the investigation as it expanded might ideally have included more detail, Judge McBryde was neither prejudiced in preparing for the hearing, nor deprived of the essential information he needed to do so. *See* Order of September 18, 1998 at 11 ("The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated."). In response to the new charges this expansion precipitated, Judge McBryde was afforded additional time to prepare. *See id.*

Inadequate notice also inspires Judge McBryde's complaint with respect to the Judicial Council's December 17, 1997 meeting and its December 31, 1997 Order. After being served with the Special Committee's 159-page final Report on December 4, Judge McBryde enjoyed less than two weeks to prepare his response thereto in time for the Judicial Council to consider it in advance of the meeting. *See* Pl.'s Mot. Summ. J. at 99. Nonetheless, and "[t]hrough great effort and expense," *id.* at 100, Judge McBryde managed to prepare several extensive responses. The Court cannot say that this interval, abbreviated as it may have seemed to Judge McBryde, deprived Judge McBryde of notice so as to violate his due process rights. Nor can the Court say that the period of time during which members of the Judicial Council considered his responses prior to their meeting, or the two weeks during which they reviewed additional responses from Judge McBryde before issuing their

December 31 Order, is so brief that it amounts to a "rush to judgment" by the Council in violation of constitutionally mandated due process. *Id.* at 99-101. As this Court remarked in the context of Judge McBryde's requests to conduct discovery on the process by which the Judicial Council reached its final decision, his "rush to judgment" theory is predicated on certain unsupported assumptions about the appropriate amount of time a decisionmaker should devote to arriving at its decision. *See* Memorandum Op. of Sept. 30, 1999 at 4. No constitutional rights are necessarily at stake in a purported deviation from his ideal standard.

Finally, an alleged due process violation animates Judge McBryde's claims that the Special Committee, and accordingly the Judicial Council, relied on hearsay and other impermissible evidence in making its findings of fact. Thus, Judge McBryde maintains, he remained unable to confront witnesses and evidence against him. *See id.* at 105. For example, the Special Committee's allusion to "the reluctance of witnesses to come forward and to testify in these proceedings because they fear reprisal," a reluctance that, in some cases, necessarily escaped documentation in the record, appears to present evidence which Judge McBryde was unable to confront. Still, the Court is persuaded that such evidence did not dictate nor even shape the Special Committee's ultimate findings, or the Judicial Council's decision. Instead, the Special Committee relied upon twenty discrete, and amply documented, incidents in rendering its determinations about Judge McBryde's intemperate and abusive behavior. Remarks such as the one quoted above may bolster the conclusion that Judge McBryde's conduct impacted the Fort Worth legal community in significant ways, but they are in no sense necessary to that conclusion; rather, the parade of witnesses and reams of documentary evidence fully demonstrate that Judge McBryde inspired fear and intimidation in many attorneys who appeared before him. Accordingly, the Court finds that the hearsay, gossip, and other forms of evidence that may have contributed to the Special Committee's findings remained so ancillary to the bulk of the evidence upon which the Special Committee relied as not to present any potential due process violation.

b. Structural Defects

Further, Judge McBryde contends that, by improperly conflating investigative and adjudicative functions, the Judicial Council violated his due process rights. He argues specifically that the deference which the Judicial Council granted to the Special Committee's findings and recommendations effectively transferred the adjudicative function from the former to the latter. As a consequence, the Special Committee operated not just as an investigative body, but as a "prosecutorial-investigative-adjudicative body." Pl.'s Opp. to United States' Mot. Dismiss at 15.[21] In addition, Judge McBryde maintains, four members of the Special Committee who participated in the investigation of the complaints against him subsequently participated in the Judicial Council's adjudication of those complaints. *See* Pl.'s Mem. Supp. Mot. Summ. J. at 114.

In the words of the Supreme Court, however,

> [t]he contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative

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[21] Although both Defendant and Defendant-Intervenor understood Judge McBryde to be advancing a facial due process claim, alleging that the Act itself impermissibly sanctions a combination of investigative and adjudicative functions in members of the Judicial Council who also participated in the Special Committee's investigation, *see* United States Mem. Opp. Pl.'s Mot. Summ. J. at 9; Def.'s Mem. Supp. Mot. Dismiss or for Summ. J. at 41-42, Judge McBryde characterizes his claims otherwise. *See* Pl.'s Omnibus Reply to Opp. Mot. Summ. J. a 35. ("As Judge McBryde has previously explained, his due process claims are not a facial attack on the Act, but a complaint that the proceedings carried out against him denied him due process.") Rather, his claim targets another as-applied violation, in this case the improper overlap of these functions *contrary* to the intent of the Act. *See* Compl. ¶ 92c; Pl.'s Response to United States' Mot. Dismiss at 14 ("Indeed, it is [Judge McBryde's] position that the Act does not combine investigative and adjudicative functions. It intends that they be separate.")

> powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Withrow et al. v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 43 L.Ed.2d 712 (1975). Similar claims "have been squarely rejected in prior decisions of [that] Court." *Id.* The *Withrow* plaintiff, a licensed physician whose practice consisted of performing abortions, faced suspension of his license by a state medical examining board which conducted its own investigation. *See id.* at 38-41, 95 S.Ct. 1456. He sought to enjoin the board from deciding the issue of suspension, arguing that such a combination of functions violated guarantees of due process, *see id.* at 42, 95 S.Ct. 1456, but the Supreme Court disagreed. Rejecting his challenge, the Court concluded that, absent specific evidence of bias, "the mere exposure to evidence presented in nonadversary investigative proceedings is insufficient ... to impugn the fairness of the Board members at a later adversary hearing." *Id.* at 55, 95 S.Ct. 1456.

Accordingly, while "we should be alert to the possibilities of bias that may lurk in the way particular procedures actually work in practice...," *id.* at 54, 95 S.Ct. 1456, the dual service of Committee members as Council members, and the practice of deferring to the extensive, and painstaking, fact finding of the investigative body, "do not in themselves contain an unacceptable risk of bias." *Id.* In *Hastings v. Judicial Conf. of the United States,* 829 F.2d 91 (D.C.Cir.1987), *cert. denied,* 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988) ("*Hastings III*"), the District of Columbia Circuit considered precisely this question in the context of a facial attack on the Act. Quoting the Supreme Court's language in *Withrow,* the *Hastings III* Court held that no risk of bias emanating from the overlap of adjudicative and investigative functions inhered in the Act. *Id.* at 105. In the most eloquent and emphatic terms, the Court wrote:

> The fact that federal judges administer the mechanism described by the Act contributes in no small measure to this conclusion. They are called upon every day to put aside considerations not legally relevant to their decisions. A

> judge who can decide a case one way, notwithstanding inadmissible evidence of which he is aware indicating a different result, is not likely to prejudge a fellow judge's cause. If there is a risk here, it is the risk that an empathetic decision-maker poses to the public, not a risk of bias toward the judge against whom a complaint has been lodged.

Id. Indeed, Judge McBryde has adduced no evidence to suggest that this overlap of functions, either via the deference the Judicial Council may have accorded the Special Committee, or via the dual service of certain judges, operated here to deprive him of due process.

c. Improper Motives

While these structural aspects of the proceedings may not in themselves have deprived Judge McBryde of his constitutionally guaranteed due process, he also maintains that specific judges who served in investigative and adjudicative capacities harbored illegitimate motives against him. In particular, he contends that Chief Judge Politz's putative threat (warning him that his entire judicial career would be explored if he sought assistance from the Judicial Council in response to the *Satz* and *Torres* disputes, *see* Pl.'s 108(h) ¶ 16) heralded a process motivated by vengeance and bias. According to Judge McBryde, several of the judges involved in the investigation endeavored to retaliate against him both for his refusal to undergo a psychiatric evaluation, and for his ultimate triumph in persuading the Fifth Circuit to vacate Chief Judge Buchmeyer's reassignment orders. *See generally* Pl.'s Mot. Summ. J. at 108-14.

Judge McBryde raised these contentions both before the Judicial Council and before the Review Committee. He moved for the recusal of several judges from the Special Committee and the Judicial Council; the final such motion occurred before the December 17, 1998 meeting of the Judicial Council. There the named judges declined to recuse, but subsequently withdrew from the meeting while the remaining members discussed and reviewed the motion. In the absence of their fellow judges, the remaining members of the Judicial Council denied Judge McBryde's motion for recusal of the judges he identified. *See* Def.'s Mot. to Dismiss or for Summ. J. at 60-61. As Defendants

have persuasively characterized Judge McBryde's ongoing claim of bias following this practice,

> the unstated but necessary predicate for Judge McBryde's position is that all fourteen members of the Judicial Council not accused by Judge McBryde of bias and all five members of the Review Committee (each an Article III judge even if serving in an administrative capacity) were either 'tainted' or so 'cowed' by the 'biased' judges as to have been unable to think or to act independently on the basis of the record.

Def.'s Opp. to Pl.'s Mot. Summ. J. at 26. The Court finds such a position utterly implausible. Cases in which "the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally desirable" include "those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him." *Withrow,* 421 U.S. at 47, 95 S.Ct. 1456 (citations omitted). Judge McBryde has presented no such circumstances to impute bias to these or other participants in the challenged process. Instead, he offers mere conclusory allegations of bias and vindictiveness that are effectively barred under *Withrow. See id.*

D. Judge McBryde's First Amendment Claim.

Finally, Judge McBryde has alleged that the Act's confidentiality clause violates the First Amendment, both facially and as it has been applied to him. Section 372(c)(14) provides in relevant part that

> all papers, documents, and records of proceedings related to investigations conducted under this subsection shall be confidential and shall not be disclosed by any person in any proceeding except to the extent that--
>
> > (C) such disclosure is authorized in writing by the judge or magistrate who is the subject of the complaint and by the chief judge of the circuit, the Chief Justice, or the chairman of the standing committee established under section 331 of this title.

28 U.S.C. § 372(c)(14). Since the issuance of the Review Committee's Order, Judge McBryde has sought to make public the entire record of these proceedings. In his view, the imperatives of confidentiality that have protected this record

from disclosure have "precluded him from defending himself in public against the accusations made by the Council and the Review Committee ...." Pl.'s 108(h) ¶ 199.

1. Events Relating to this Claim

When Judge McBryde filed his complaint in this Court, he had, per section 372(c)(14), tendered requests to both Chief Judge Politz and Judge Bauer to release the record in full. Both judges refused to accede to what they characterized as Judge McBryde's "all or nothing" request. *See* Defs.' letter to C.J. Rehnquist, Nov. 23, 1998 at 3 (Pl.'s Ex. 185). Both judges were willing to release a majority of the record with certain exceptions, including the psychiatric materials and witness identities. Judge McBryde had not yet availed himself of the third option which the statute provides for such a situation: petitioning Chief Justice William Rehnquist. Judge McBryde feared that to involve Chief Justice Rehnquist risked the possibility that, should his response become a subject of this lawsuit, the Chief Justice would be obliged to recuse himself from any consideration that the Supreme Court might later afford this case. *See* Compl. ¶ 97.

Since the filing of this case, the contours of Judge McBryde's First Amendment claim have shifted significantly. In November of 1998, Judge McBryde did petition the Chief Justice, via letter, to permit him to disclose the entire record. While the parties awaited a response from Chief Justice Rehnquist, both Defendants and the United States maintained that Judge McBryde's First Amendment claim was not yet ripe for adjudication in this Court; after all, it remained possible that the Chief Justice would endorse his view that full disclosure of all the proceedings was now warranted. Accordingly, by agreement with the parties, the Court entered a protective order requiring the parties to redact their public filings in accordance with section 372(c)(14), and stipulated that the record would be unsealed if Judge McBryde obtained the requisite authorization, or if he prevailed on his First Amendment claim. Thus when Judge McBryde filed with this Court all the documents relating to the section 372(c) proceedings, the Court placed these under seal as well.

On June 11, 1999, the same day that the Court had scheduled oral argument on the dispositive motions in this case, Judge McBryde filed an additional motion to unseal the entire record along with a declaration from his attorney testifying to the hardship which the confidentiality requirement imposed on him and his client. *See* Pl.'s Mot. to Unseal Documents; Broiles Decl. ¶ 6. While earlier Judge McBryde had adduced arguments relating to the facial invalidity of the confidentiality provision, and the extent to which its application in his case had prevented him from engaging in the full and open discussions to which he aspired, his motion to unseal undertook a new line of analysis. There he argued that, both facially and as applied to him, section 372(c)(14) constituted a prior restraint on his ability to speak freely. *See* Pl.'s Mot. to Unseal Documents at 2-3 (citing, *inter alia, City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 757, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988); *Kamasinski v. Jud. Rev. Council,* 44 F.3d 106, 112 (2d Cir.1994)). Three days later, before the Court had the opportunity to consider Judge McBryde's latest motion, Chief Justice Rehnquist replied to Judge McBryde's request authorizing disclosure of all portions of the record save "the identity of the witnesses in the proceedings." C.J. Rehnquist letter of June 11, 1999 (Pl.'s Ex. 189). As justification for this remaining prohibition on disclosure, the Chief Justice cited Rule 15(G) of the Fifth Circuit Complaints Rules: "In any disclosure, the chief judge may for good cause require the shielding of identity of the complainant, or of any witnesses in an investigation conducted by special committee or the judicial council or in a limited inquiry conducted by the chief judge." Fifth Cir. Compl Rules 15(G). In the Chief Justice's words, "[t]he rule is designed in part to encourage potential complainants and witnesses to participate in judicial misconduct cases, and its application in this proceeding appears reasonable and should not prejudice any substantive arguments [Judge McBryde] may make about the record." C.J. Rehnquist letter at 1.

When filing this letter with the Court, Judge McBryde indicated in an attached affidavit that the Chief Justice's authorization did permit him to make some of the disclosures he

"considered essential to be made for the public to have an understanding of the nature of the proceedings that were conducted against [him] and the magnitude of the improprieties in which participants in the proceedings have engaged ...." Nonetheless, he felt that, *pace* Rehnquist's assurance to the contrary, the remaining ban against disclosing witnesses' identities significantly prejudiced his ability to discuss, fully and frankly, the "nature of the proceedings" to which he had been subjected. *See* June 16, 1999 McBryde Decl. at 2-3. This Court ultimately denied Judge McBryde's motion to unseal on the grounds that the sealed portions of the record are riddled with references to the identity of the witnesses, and it was therefore impossible to unseal those portions of the record that were filed under seal without violating the terms of the Chief Justice's limited authorization. *See* Amended Protective Order, filed Sept. 30, 1999.

Chief Justice Rehnquist's qualification with respect to "the identity of the witnesses in the proceedings" has occasioned some confusion among the parties. This reference to "the identity of the witnesses" leaves uncertain the scope of the precise information protected from disclosure. For instance, Judge McBryde contends that "virtually every one of the fifty-five witnesses to which the Chief Justice referred could be identified by the testimony he or she gave even if the names were deleted." Pl.'s Reply to Defs.' Supp. Response at 4- 5. He points out that efforts to safeguard witnesses' names will necessarily confront the extent to which other contextual information relating to these witnesses will lead ineluctably to the discovery of their identities. Defendants, however, have maintained that "if Judge McBryde wishes to disclose the record, he must redact the *names* of witnesses ...." Defs.' Mem. in Response to Pl.'s Mot. Unseal at 4 (emphasis added). The Court resolved this ambiguity by determining, in its Amended Protective Order, that Chief Justice Rehnquist's letter prohibits disclosure only of the names of the witnesses in the section 372(c) proceedings. *See* Amended Protective Order at 3. More recently, the Court also ordered that the parties respond more directly to Judge McBryde's arguments in light of the new status

quo following the Chief Justice's limited authorization. *See* Order of Nov. 18, 1999.

2. Judge McBryde's Argument.

According to Judge McBryde, the ambiguity surrounding the scope of the Chief Justice's prohibition exemplifies the unconstitutionality of section 372(c)(14). This provision, he contends, granted three government officials, and ultimately the Chief Justice, unbridled discretion to decide whether and within what content-based parameters Judge McBryde may speak.[22] *See* Pl.'s Omnibus Reply to Defs.' and United States' Opp. to Mot. to Unseal at 8- 9. It is, he claims, "a classic prior restraint disguised as a licensing scheme; that is, before he may speak on core political issues, Judge McBryde first has to ask permission from Judges Politz and Bauer and Chief Justice Rehnquist." *Id.* at 9. Judge McBryde has taken the position that the statute operates facially as an impermissible prior restraint because it provides that all "papers, documents, and records" relating to section 372(c) proceedings "shall not be disclosed by any person ... except to the extent that ... such disclosure is authorized" by the subject judge and one of three other government officials. 28 U.S.C. § 372(c)(14); *see* Pl.'s Omnibus Reply to Court--Ordered Responses at 4. In other words, he maintains, the statute sets up a kind of suspect licensing scheme wherein the ability to engage in core political speech is contingent upon the permission of government officials, without offering any guidelines or standards by which those officials' discretion may be curtailed. *See id.* Moreover, he asserts that the statute has been applied to Judge McBryde as an unconstitutional prior restraint, preventing him from speaking freely per Chief Justice Rehnquist's ongoing interdiction against full disclosure of the record and its seemingly uncertain scope. *See id.* at 9-10.

3. Viewing Judge McBryde's Claim in Light of First Amendment Doctrine

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[22]Specifically, he argues that "[t]his unbridled discretion-- which here was exercised on the basis of content--that § 372(c)(14) grants to the Chief Justice is precisely what makes the provision unconstitutional on its face." *Id.* at 8-9.

Speech on public issues, particularly the conduct and performance of government officials, occupies "the highest rung of the hierarchy of First Amendment values ...." *Carey v. Brown,* 447 U.S. 455, 467, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1979). In *Mills v. Alabama,* 384 U.S. 214, 86 S.Ct. 1434, 16 L.Ed.2d 484, the Supreme Court announced that, "[w]hatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs." *Id.* at 218, 86 S.Ct. 1434; see also *New York Times Co. v. Sullivan,* 376 U.S. 254, 270, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) (exhorting that "debate on public issues should be uninhibited, robust, and wide-open"). It is beyond peradventure, then, that complaints about the judicial behavior of a federal judge, a government official endowed with life tenure absent extraordinary circumstances, rest at the center of the kind of expression the First Amendment must protect. *Cf. Landmark Communications,* 435 U.S. at 839, 98 S.Ct. 1535; *First Amendment Coalition v. Jud. Inquiry and Rev. Bd.,* 784 F.2d 467, 473 (3d Cir.1986) (both discussing the significance of public debate about the conduct of the judiciary in the context of reviewing state judicial misconduct hearings). Surely this protection extends not only to the complainants and other interested parties, but also to the judges themselves to marshal their own explanation or defense.

Indeed, any provision that restricts speech on the basis of its content must undergo "the most exacting scrutiny." *Boos v. Barry,* 485 U.S. 312, 321, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988). To withstand such scrutiny, the provision in question must be both "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Id.; see also Carey v. Brown,* 447 U.S. 455, 461, 100 S.Ct. 2286, 65 L.Ed.2d 263 (1980). Nonetheless, even "core" protected speech is not immune from government regulation. Early in this century, Justice Brandeis wrote:

> The right to free speech, the right to teach and the right of assembly are, of course, fundamental rights. These may not be denied or abridged. But, although the rights of free speech and assembly are fundamental, they are not in their

> nature absolute. Their exercise is subject to restriction, if the particular restriction is required in order to protect the State from destruction or serious injury, political, economic or moral.

Whitney v. California, 274 U.S. 357, 373, 47 S.Ct. 641, 71 L.Ed. 1095 (1927) (Brandeis, J., concurring). Accordingly, courts have permitted limited regulation of speech through permissible time, place, or manner restrictions, *see United States v. Grace,* 461 U.S. 171, 177, 103 S.Ct. 1702, 75 L.Ed.2d 736 (1983), and in cases where the state interest is so weighty, and the regulation so narrowly tailored, that it prevails despite the public interest in unfettered expression.

Still, the burden such a regulation must overcome is most onerous when it constitutes a prior restraint on speech. *See Smith, et al. v. Daily Mail Publishing Co., et al.,* 443 U.S. 97, 102, 99 S.Ct. 2667, 61 L.Ed.2d 399 (1979) (according prior restraints on speech "the most exacting scrutiny"). Whereas threats of subsequent penalties, whether criminal or civil damages, may well operate to "chill" speech, "a prior restraint freezes speech before the audience has the opportunity to hear the message." *In the Matter of Providence Journal Co.,* 820 F.2d 1342, 1345-46 (1st Cir.1986). Thus, prior restraints pose an even more immediate menace than do other kinds of regulations. Justice Douglas, for example, issued the following caveat: "For if a person must pursue his judicial remedy [of lifting an injunction] before he may speak, parade, or assemble, the occasion when protest is desired or needed will have become history and any later speech, parade, or assembly will be fruitless or pointless." *Walker v. City of Birmingham,* 388 U.S. 307, 336, 87 S.Ct. 1824, 18 L.Ed.2d 1210 (1967) (Douglas, J., dissenting).

The Court is persuaded that section 372(c)(14), as it has been applied to Judge McBryde, operates as a prior restraint.[23] From September 1998, when the Review Committee issued its

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[23]Because the Court finds that the confidentiality provision has functioned as an unconstitutional prior restraint in its application to Judge McBrdye, it need not reach the issue of whether or not section 372(c)(14) itself is facially unconstitutional.

Order and Memorandum Opinion, to June 1999, when Chief Justice Rehnquist authorized the limited disclosure of the record of the proceedings, Judge McBryde was precluded from speaking freely and openly about the process that led to his public reprimand, his recusal from certain cases, and the suspension of all new cases for one year. Judge McBryde essentially petitioned Judges Politz and Bauer for a license to disclose all aspects of the proceedings which he felt were relevant to his defense or deserving of censure. However, those two of the three government officials authorized by the Act to provide such permission declined to disclose all matters, including the identity of witnesses. Then, in June 1999, Chief Justice Rehnquist responded to Judge McBryde's entreaty by authorizing what Judge McBryde sees as a partial, and inadequate, disclosure. *See* McBryde Decl. of June 16, 1999 at 3-7. Thus, the current application of the confidentiality provision to Judge McBryde continues to act as a restraint on his speech, a restraint that targets particular content (the identities of the witnesses) which Judge McBryde deems essential to his defense.

Nonetheless, we recall that "[f]reedom of speech ... does not comprehend the right to speak on any subject at any time." *American Communications Ass'n v. Douds,* 339 U.S. 382, 394-95, 70 S.Ct. 674, 94 L.Ed. 925 (1950). For example, the Supreme Court has upheld restrictions on speech in the context of civil discovery, leaving intact a protective order that prohibited dissemination of information which one party learned about the other during pretrial discovery. *See Seattle Times Company v. Rhinehart et al.,* 467 U.S. 20, 37, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984). Notwithstanding Defendants' and Intervenor-Defendants' arguments to the contrary, however, *Seattle Times* is inapposite to the case at bar. There the Court emphasized that, "[i]n sum, judicial limitations on a party's ability to disseminate information discovered in advance of trial implicates the First Amendment rights of the restricted party to a far lesser extent than would restraints on dissemination of information in a different context." *Id.* at 34, 104 S.Ct. 2199. Unlike such a protective order, appropriate to the "unique character of the discovery process," *id.* at 36, 104 S.Ct. 2199,

the operative restriction on Judge McBryde's speech applies to the adversarial proceedings that ultimately engendered very public consequences. These consequences include not only a public reprimand and publicly known sanctions, but also, via the internet, the publication of the December 31 Order on the Fifth Circuit's official web site, along with the names of the 23 lawyers, and presumably witnesses, before whose cases Judge McBryde is to recuse himself. *See* http://www.ca5.uscourts.gov/mcbryde/mcbryde.htm (containing links to both the December 31 Order and the September 28 Memorandum and Order). To justify the restriction at issue here, a prior restraint on Judge McBryde's speech, the state interests warranting it must be sufficiently pressing.

When examining these interests, the Court notes that all fifty states and the District of Columbia have created some body or commission with its own set of procedural rules to monitor and review judicial conduct. Each and every jurisdiction provides some degree of confidentiality protection to guard the judicial disciplinary process, although these provisions vary in the duration of their application and the scope of their reach. *See* Bryan Keyt, *Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment,* 7 Geo J. Legal Ethics 959, 961 & nn. 18- 20 (1994) (listing each constitutional or statutory provision mandating confidentiality, organized by the stage at which this protection ceases). In no jurisdiction, however, does the mandate of confidentiality continue in perpetuity. *See id.*

Several federal courts, including the Supreme Court, have considered these provisions in the context of state judicial disciplinary proceedings. The *Landmark* Court addressed the narrow question of "whether the First Amendment permits the criminal punishment of third persons who are strangers to the inquiry, including the news media, for divulging or publishing truthful information regarding confidential proceedings of the [Virginia] Judicial Inquiry and Review Commission." *Landmark Communications,* 435 U.S. at 837, 98 S.Ct. 1535. Appellant, a newspaper, challenged its conviction for publishing an article that discussed proceedings before the Commission while those proceedings were pending. Assuming without deciding that

judicial independence and protecting judges' reputations were legitimate and significant state interests, the Court nonetheless found that the provision ran afoul of the First Amendment.

> Admittedly, the Commonwealth has an interest in protecting the good repute of its judges, like that of all other public officials. Our prior cases have firmly established, however, that injury to official reputation is an insufficient reason 'for repressing speech that would otherwise be free.' The remaining interest sought to be protected, the institutional reputation of the courts, is entitled to no greater weight in the constitutional scales.

Id. at 841-42, 98 S.Ct. 1535 (quoting *New York Times v. Sullivan,* 376 U.S. at 272-73, 84 S.Ct. 710; also citing *Garrison v. Louisiana,* 379 U.S. 64, 67, 85 S.Ct. 209, 13 L.Ed.2d 125 (1964)). Accordingly, the Court held that criminal prosecution of a third party who publishes truthful information regarding such proceedings was impermissible under the First Amendment. *Id.* at 845-46, 98 S.Ct. 1535.

Following that case, Virginia amended the relevant portion of the statute to apply only to *participants* in Commission proceedings. *See Baugh et al. v. Judicial Inquiry & Rev. Com'n,* 907 F.2d 440, 443 (4th Cir.1990). In a later case, attorneys who had filed complaints about state judges with the Commission challenged the constitutionality of the remaining confidentiality provision. *See id.* The Fourth Circuit found that the portion applying to complainants who wished to disclose the fact and outcome of their complaints deserved the most exacting scrutiny. *Id.* at 444 (citing *Boos,* 485 U.S. at 321, 108 S.Ct. 1157.). It thus reversed the district court's dismissal of the challenge, which was predicated on a more lenient standard of review. *Cf. Kamasinski,* 44 F.3d at 110-11(upholding the confidentiality provisions of a Connecticut statute that maintained the confidentiality of judicial discipline proceedings unless the Judicial Review Council found probable cause to determine that judicial misconduct had occurred); *First Amendment Coalition,* 784 F.2d at 468 (upholding the constitutionality of a similar Pennsylvania statute permitting public access to the records of its judicial review board only if the board recommends imposing discipline, but holding the

board's order banning witnesses from disclosing their own testimony overbroad). The Court emphasizes that in none of these cases did the challenged statute require confidentiality once the proceedings had reached their conclusion and the subject judge had been censured. In fact, the *Kamasinski* court noted specifically that "[o]nce the JRC [Judicial Review Council] has determined whether or not there is probable cause that judicial misconduct has occurred, even Connecticut's most compelling interests cannot justify a ban on the public disclosure of allegations of judicial misconduct." *Id.* at 112.

In a somewhat analogous context, the Supreme Court held unconstitutional a Florida statute prohibiting a grand jury witness from revealing the substance of his or her testimony, even after the proceedings had concluded. *See Butterworth v. Smith,* 494 U.S. 624, 626, 110 S.Ct. 1376, 108 L.Ed.2d 572 (1990) (Rehnquist, C.J.). Asserting that the state interests in preserving grand jury secrecy did not "warrant a permanent ban on the disclosure by a witness of his own testimony once a grand jury has been discharged ...," the Court reasoned that these interests (*e.g.,* the need to keep information from the target of the investigation, the need to prevent the importuning of grand jurors) became obviated once the grand jury adjourned. *Id.* at 632-33, 110 S.Ct. 1376.

A certain irony characterizes Judge McBryde's First Amendment claim before this Court. In every other case known to this Court involving judicial disciplinary proceedings, challenges to the confidentiality provision have issued from a complainant, witness, or third party. That person's right to speak about the proceedings had to be balanced against the state's legitimate interest in protecting the judge and the judiciary as an institution. Here, however, the subject judge himself maintains that to vindicate his reputation, he must be permitted to speak openly about the very proceedings that impugned him. Such a case would seem unusual, to say the least, possibly contemplated neither by individual courts nor by any legislature. Still, upon review of Judge McBryde's claim, this Court cannot disregard or diminish a judge's interest in vindicating his reputation, and in announcing his perspective on the

proceedings to all who will listen. Indeed, this interest surely deserves the most heightened First Amendment protection.

Moreover, while the confidentiality provision in the Act and its state counterparts serves a variety of legitimate state interests--protecting the judge from spurious criticism, the judiciary as an institution from disrepute, and witnesses and complainants from unwanted publicity--the paramount interest is that of the subject judge.[24] Publication of frivolous and unfounded complaints threatens to impugn, and even destroy, a judge's reputation even when an investigation ultimately acquits him or her. According to Judge McBryde, the Defendants' silence in their November 23, 1998 letter to the Chief Justice on the issue of protecting witnesses' identities from disclosure is "tantamount to an admission by defendants that there is no compelling state interest for denial of disclosure of the identities of the witnesses in the proceedings." Pl.'s Omnibus Reply to Opp. to Mot. Unseal at 22. The Court does not go so far as to endorse this view, but rather understands the Chief Justice, citing the Fifth Circuit Rules, to have articulated a legitimate concern for witness privacy and the necessity of encouraging witnesses to come forward with complaints in other instances. In his response to Judge McBryde, the Chief Justice was acting strictly in an administrative capacity, carrying out the function delineated by the statute; he was neither reviewing nor issuing a ruling on the constitutionality of the provision. Nonetheless, the Court finds that, at the point where the proceedings have

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[24]In its report recommending passage of the Act, the Senate Judiciary Committee identified the principal interests served by the confidentiality provision: "The Committee believes that the establishment of a confidentiality provision will avoid possible premature injury to the reputation of a judge." 1980 U.S.C.C.A.N. 4215, 4330. Indeed in the version of the statute under consideration by the Committee, the confidentiality provision articulated three exceptions to its application: (1) an authorized written waiver by the subject judge; (2) issuance of a public censure or reprimand; or (3) a final adverse action taken against the judge, not including an order of dismissal. *See id.* Each of these exceptions presumes one thing: that the primary interest at stake resides in the reputation of the judge. In the first exception, this interest has been waived; in the second and third, the interest is obviated by the results of the proceedings.

long since concluded and Judge McBryde has undergone a public reprimand and sanctions, this interest loses much of its significance. In addition, as Judge McBryde points out, the names of many of the witnesses have already reached the public domain, through the internet or through newspaper accounts of the proceedings. Other witnesses are easily identified through contextual information which Judge McBryde is permitted to disclose, in accordance with the Court's narrow interpretation of the Chief Justice's letter. At this stage, the interest of protecting witnesses' names cannot possibly justify the imposition of a prior restraint on Judge McBryde's ability to discuss and to challenge publicly the proceedings that resulted in his censure.

In sum, the Court finds that section 372(c)(14), as it has been applied to Judge McBryde, operates as an unconstitutional prior restraint on his ability to speak. The interest in shielding witnesses from publicity and encouraging complainants to come forward in the future, while legitimate, is insufficient to justify the restriction on Judge McBryde's open and frank discussion of the proceedings once they have concluded and sanctions have been imposed.

III. CONCLUSION

For the reasons stated above, judgment shall be entered for Defendants and the United States on all claims save Judge McBryde's First Amendment claim. The Court shall enter judgment for Judge McBryde on his claim that the confidentiality clause, as it has been applied to him, violates the First Amendment.

An order accompanies this memorandum opinion.

December 30, 1999

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

INDEX

I. BACKGROUND ..... [55a]

A. The Statutory Scheme ..... [55a]

B. The Special Committee's Investigation and Report ..... [57a]

C. Action by the Judicial Council and the Review Committee ..... [67a]

D. Proceedings in this Court ..... [71a]

II. DISCUSSION ..... [73a]

A. Judge McBryde's Claim that the Act is Facially Unconstitutional ..... [73a]

1. Whether the Act Endows the Judicial Branch with Powers More Appropriately Exercised by Other Branches (Count I) .... [75a]
2. Whether the Act Threatens the Institutional Integrity of the Judicial Branch (Count III) ..... [77a]
3. Whether the Act Allows Improper Exercise of Article III Power (Count II) ... [82a]

B. Potential Limits on this Court's Jurisdiction ... [83a]

1. Expanded Scope of the Investigation ..... [88a]
2. "Merits-Relatedness" ..... [89a]
3. The Non-Constitutional Claims ..... [96a]

C. As-Applied Constitutional Claims ..... [96a]

1. Separation of Powers ..... [97a]
2. Due Process ..... [98a]

D. Judge McBryde's First Amendment Claim ... [108a]

1. Events Relating to this Claim ..... [109a]
2. Judge McBryde's Argument ..... [112a]
3. Viewing Judge McBryde's Claim in Light of First Amendment Doctrine ..... [112a]

III. CONCLUSION ..... [120a]

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF COLUMBIA

No. 98-2457 (CKK)

HON. JOHN H. MCBRYDE,
Plaintiff,
v.
COMMITTEE TO REVIEW CIRCUIT
COUNCIL CONDUCT AND DISABILITY
ORDERS OF THE JUDICIAL
CONFERENCE OF THE UNITED STATES,
HON. WILLIAM J. BAUER, THE
JUDICIAL COUNCIL OF THE FIFTH
JUDICIAL CIRCUIT, HON. HENRY A. POLITZ,
Defendants,
and
THE UNITED STATES OF AMERICA,
Intervenor-Defendant.

ORDER

For the reasons expressed in the accompanying Memorandum Opinion it is, this 30 day of December, 1999, hereby

ORDERED that Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment [# 45] is GRANTED as to all of Judge McBryde's claims with the exception of his First Amendment claim; and it is further

ORDERED that Intervenor-Defendant's Motion to Dismiss [# 50] is GRANTED as to all of Judge McBryde's claims with the exception of his First Amendment claim; and it is further

ORDERED that Plaintiff Judge McBryde's Motion for Summary Judgment [# 51] is DENIED as to all claims, EXCEPT that the Motion is GRANTED for Plaintiff as to his claim that the Act has been applied to him in a manner that violates the First Amendment; and it is further

ORDERED that entry of judgment on Plaintiff's First Amendment claim is STAYED until January 7, 2000, so that defendants, should they wish to do so, may seek an additional

stay from the United States Court of Appeals pending any appeal; that all sealing orders shall remain in effect during this period of the stay.

SO ORDERED.

/s/
COLLEEN KOLLAR-KOTELLY
United States District Judge

APPENDIX C

BEFORE THE COMMITTEE TO REVIEW CIRCUIT COUNCIL CONDUCT AND DISABILITY ORDERS JUDICIAL CONFERENCE OF THE UNITED STATES

No. 98-372-001

In re: Complaints of Judicial Misconduct or Disability

COMMITTEE MEMORANDUM AND ORDER

This matter is before the Judicial Conference Committee to Review Circuit Council Conduct and Disability Orders pursuant to petitions for review received on March 16, 1998.[1]

Background

We will not attempt to recite in detail here all the long history of these proceedings. We merely summarize below some major aspects of that history that we deem especially relevant to our memorandum and order. In addition, we will not discuss the specifics of the factual underpinnings of the charges against the named judge and the judicial council's findings thereon. The judicial council has determined that, at least at the present time,

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[1]Under 28 U.S.C. § 372(c)(10), "A complainant, judge, or magistrate aggrieved by an action of the judicial council under paragraph (6) of this subsection [-- the paragraph under which the judicial council may take action on, or may dismiss, a complaint of judicial misconduct or disability following the report of a special investigating committee --] may petition the Judicial Conference of the United States for review thereof. The Judicial Conference, or the standing committee established under section 331 of this title, may grant a petition filed by a complainant, judge, or magistrate under this paragraph."

Section 331 of 28 U.S.C. provides, "The Conference is authorized to exercise the authority provided in section 372(c) of this title as the Conference, or through a standing committee. If the Conference elects to establish a standing committee, it shall be appointed by the Chief Justice and all petitions for review shall be reviewed by that committee."

The Judicial Conference has established this committee to be the standing committee authorized to act for the Judicial Conference under § 331 in proceedings of this kind. Pursuant to §§ 331 and 372(c)(10), this committee may grant or deny complainant's petitions for review, and the committee's orders in this respect are final and not appealable.

these matters should remain confidential, and we defer to that determination.

On July 5, 1995, an attorney filed a complaint against United States District Judge John McBryde of the Northern District of Texas under section 372(c) alleging that the judge's conduct during a trial had been "obstructive, abusive and hostile." On September 13, 1995, Chief Judge Henry Politz of the Fifth Circuit appointed a special committee, consisting of himself and four other judges, to investigate the allegations of this complaint. He also identified as a complaint a letter he had received criticizing Judge McBryde's conduct in another case, and referred this identified complaint to the special committee for investigation. Subsequently, by orders dated January 31, 1996, and March 19, 1996, Chief Judge Politz identified as complaints three additional complaints or letters he had received objecting to Judge McBryde's conduct in these or other cases, and referred all three complaints to the special committee.

The special committee originally scheduled evidentiary hearings on these allegations to commence on May 19, 1997. On May 5, 1997, special committee counsel notified counsel for Judge McBryde of the witnesses the special committee intended to present, and stated that the special committee might add to the record transcripts and court decisions from thirteen cases handled by Judge McBryde that had not been the subject of any complaint. After the judge moved to strike these latter exhibits or, in the alternative, to continue the hearings, the special committee continued the hearings until August 25, 1997.

The special committee counsel on July 25, 1997, sent counsel for Judge McBryde a letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each matter was accompanied by a paragraph of explanation.

Later, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. The letter added that the special committee's counsel might present evidence concerning the

judge's unspecified conduct in another named case. After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997.

The special committee conducted evidentiary hearings from August 25, 1997, through August 29, 1997. On September 17, 1997, the special committee's counsel sent counsel for Judge McBryde a letter listing the four witnesses he intended to call at the resumed September 29 hearings, and setting forth the projected subject matter of the testimony of each. The hearings then resumed and concluded from September 29, 1997 through October 2, 1997.

The special committee submitted its report to the judicial council on December 4, 1997. The judicial council met to consider the report on December 17, 1997, and issued its Order and Public Reprimand on December 31, 1997.

The judicial council's Order and Public Reprimand ordered sanctions against Judge McBryde: (1) under 28 U.S.C. § 372(c)(6)(B)(vi), a public reprimand; (2) under 28 U.S.C. § 372(c)(6)(B)(iv), an order that no new cases be assigned to Judge McBryde for a period of one year; and (3) under 28 U.S.C. § 372(c)(6)(B)(vii), an order that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys. The Order and Public Reprimand states, in part, as follows:

> "To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:
>
> "1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.
>
> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal

judiciary. This conduct is unacceptable and damaging to the federal judiciary.

"Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

"2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

"3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

The judicial council stayed implementation of its Order and Public Reprimand for thirty days so that Judge McBryde could appeal to, and seek to obtain an additional stay from, this committee. The council further directed that its Order and Public Reprimand would remain sealed during the period of any stay.

On motion by Judge McBryde, this committee issued an order on February 6, 1998 (modifying this committee's prior order of January 29, 1998), staying the judicial council's Order and Public Reprimand, with the exception of paragraph 3 thereof, on the condition that Judge McBryde file his intended petition for review of the judicial council's actions on or before

March 16, 1998. This committee permitted paragraph 3, the directive that Judge McBryde not participate for a period of three years in certain defined cases involving certain listed attorneys, to take effect as of the February 6, 1998 date of this committee's order.

On March 16, 1998, Judge McBryde filed seven petitions for review of the judicial council's actions: five petitions for review of the judicial council's handling of each of the five complaints filed or identified against Judge McBryde; a petition for review of the judicial council's decision not to disqualify certain of its members from participating in its consideration of the special committee's report; and an omnibus petition for review treating all other aspects of the challenged actions of the judicial council. After this committee granted the judicial council's request to file a response to Judge McBryde's petitions, the council filed such a response on April 16, 1998. Subsequently Judge McBryde filed a reply to the judicial council's response and a supplemental memorandum, and the judicial council filed a response to the supplemental memorandum.

We now turn to our consideration of the petitions for review.

The Committee's Standard of Review

Judge McBryde and the judicial council dispute the standard of review that should be applied by this committee to a judicial council's findings of fact and to the judgments made by a judicial council in assessing the appropriateness of particular sanctions under the circumstances. According to the judge, the committee should undertake a searching, de novo review of all of the judicial council's determinations. The council responds "that at a minimum, substantial deference should be accorded its factual findings and that something approaching an abuse of discretion standard should apply to the remedies adopted in the December 31 Order. . . . The Review Committee [should] take into account the extensive efforts undertaken in developing, evaluating, and acting upon the record in this matter."[2]

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[2]There is no dispute between Judge McBryde and the judicial council that the committee, like a court of appeals, will review determinations of law de novo.

In its past decisions on petitions for review, this committee has never precisely articulated its standards for reviewing orders issued by circuit judicial councils under 28 U.S.C. § 372(c). The committee did, in no. 92-372-001 (1992), uphold a judicial council order because there was "substantial evidence in the record to support the Judicial Council's factual findings." This statement certainly makes clear that the committee was not reviewing the council's factual findings de novo.

A fair reading of the committee's past rulings suggests that the committee has not in the past applied either a de novo standard or an abuse-of-discretion standard in reviewing judicial council remedies, but something in between. The committee's most substantial assay at delineating a standard of review occurred in no. 87-372-001 (1987), in which the Tenth Circuit Judicial Council had split by a 3-3 vote on whether to accept the recommendation of the special committee that the judge be reprimanded. The committee stated as follows:

> "[H]ow much weight should be given to recommendations of the Special Committee, and how the committee should apply the standard of conduct set out in the statute against the record developed by the Special Committee and the Judicial Council is not altogether clear. The Special Committee is provided for by statute. Its duties are designated by statute. It is directed by statute to make findings and recommendations for appropriate action by the Judicial Council. Clearly, the report and recommendation of the Special Committee is entitled to be considered by the Council and this Review Committee and to be given such weight as the Judicial Council or this committee deems appropriate.
>
> "It is also clear that the Judicial Council and by virtue of the granting of a petition for review, this committee is free to accept or reject the recommendations of the Special Committee based on their perception of whether the record indicates that the conduct was prejudicial to the effective and expeditious administration of the business of the courts and to take any action whether or not recommended by the Special Committee to assure the effective and expeditious administration of the business of the courts. However, a fair

reading of the statute also leads to the conclusion that the recommendations of the Special Committee are not to be regarded lightly.

. . .

". . . The committee finds that the recommendation of the Special Committee is supported by a reasonable and responsible reading of the record."

In no. 87-372-001 this committee was not addressing the degree of deference to be accorded findings and conclusions of a judicial council, but rather the weight to be given a special committee recommendation in a situation where the council vote had been deadlocked. This committee accorded the special committee's recommendation substantial deference. Presumably judicial council findings and conclusions, arrived at following consideration of the report of a special committee, should be accorded at least as much deference as mere special committee recommendations. Thus, no. 87-372-001 provides precedent for this committee to apply a standard of substantial deference to the judicial council's findings and choice of remedies, if not an abuse of discretion standard.

The statute contains nothing that is suggestive of any particular standard of review. The Judicial Conference Rules for the Processing of Petitions for Review do state, in Rule 13, "In recognition of the review nature of petition proceedings under 28 U.S.C. § 372(c)(10), no additional investigation shall ordinarily be undertaken by the Judicial Conference or the Committee. If such investigation is deemed necessary, the Conference or Committee may remand the matter to the circuit judicial council that considered the complaint, or may undertake any investigation found to be required."

As a practical matter, de novo review of factual findings would require, at least sometimes, that this committee conduct further investigation to see and hear the testifying witnesses itself. The policy of the Conference rules that additional investigation shall not ordinarily be undertaken, and when undertaken can be done by the judicial council on remand, further strongly suggests that the rules presuppose a standard of review of factual findings more deferential than the de novo standard urged by Judge McBryde. If ordinarily it is the special

committee that actually sees and hears the witnesses, for the traditional reasons it would make little sense, and would be highly unusual, for this committee to review de novo fact findings of the special committee adopted by the judicial council.

The committee concludes, therefore, that an intermediate standard -- "substantial deference"-- should be applied to the judicial council's factual findings. The committee will accord the degree of deference the committee deems proper given the underpinnings of the particular factual determination. For example, a factual determination based on live testimony, or on inferences deriving from the circuit council's first hand knowledge of local personalities or circumstances, may therefore be accorded greater deference than a factual determination based solely on written materials equally available to the committee.

The committee will also apply a similar standard of "substantial deference" in the committee's review of the judicial council's remedies. De novo review of judicial council remedies, as urged by the named judge, would be inappropriate because it would fail to take any account of the familiarity of the judicial council members, on the spot, with the personalities and circumstances surrounding the allegations against the disciplined judge. A de novo standard would tend to undercut some of the very reasons why, under the current decentralized system of judicial discipline, disciplinary authority is primarily conferred upon local judges.

Procedural Issues

The special committee's expansion of the investigation. Judge McBryde points out that, for the most part, the judicial council's sanctions against him are not grounded upon any of the specific incidents alleged in the five complaints that were originally filed or identified against him. Instead, the lion's share of the special committee's findings adverse to Judge McBryde concerned matters not raised in those complaints that were reached as a result of the special committee's expansion of its investigation pursuant to Rule 9(A) of the Rules Governing Complaints of Judicial Misconduct or Disability adopted by the Judicial Council of the Fifth Circuit.

Rule 9(A) states as follows:

> "Each special committee will determine the extent of the investigation and the methods to be used. If the committee concludes that the judge may have engaged in misconduct beyond the scope of the complaint, it may expand that scope to encompass such misconduct, timely providing written notice of the expanded scope to the subject judge."

The statute itself does not expressly mention such expansion of a committee investigation. It simply states, "Each committee appointed under paragraph (4) of this subsection shall conduct an investigation as extensive as it considers necessary, and shall expeditiously file a comprehensive written report thereon with the judicial council of the circuit." 28 U.S.C. § 372(c)(5).

Judge McBryde argues that Rule 9(A) is improper because it is inconsistent with the statute. He reads the statute to mean that a special committee shall conduct an investigation <u>of the complaint</u> as extensive as it considers necessary, and no more.

Although the statute certainly does not expressly state that a special committee investigation may be expanded beyond the four corners of the original complaint, the statute does say that "[e]ach judicial council . . . may prescribe such rules for the conduct of proceedings under this subsection . . . as each considers to be appropriate." 28 U.S.C. § 372(c)(11). The statute thereby invites each judicial council to adopt any reasonable elaboration of the statutory procedures that it thinks proper, as long as the result is not inconsistent with the statute.

The Fifth Circuit, in the light of its experience under the statute, has exercised the discretion preserved to it by Congress to determine that special committee expansion of an investigation should be permissible. That determination does not fly in the face of any express statutory commandment and therefore does not exceed the bounds of appropriate circuit discretion.

Suppose there had been no Fifth Circuit Rule 9(A). In the midst of a special committee investigation the chief judge could, in effect, expand the special committee's investigation by identifying a new complaint under the statute, assigning it to the existing special committee for investigation, and so notifying the judge complained against. The special committee in turn could simply consolidate the new complaint or complaints with

the existing complaint or complaints. Under the Fifth Circuit rule, the special committee essentially does the same thing.[3]

The named judge arguably enjoys somewhat greater protection under Rule 9(A) than under a procedure of identifying additional complaints. Under Rule 9(A), a special committee of (in this case) five judges must agree to expand the investigation, whereas the statute permits the chief judge alone to identify a complaint and assign it for investigation by a special committee.

Judge McBryde further argues that even if Fifth Circuit Rule 9(A) is valid, "it requires that a committee may go outside the scope of a complaint only if it has specific information indicating misconduct by the judge; it by no means provides that a committee may engage in an unfettered investigation in order to develop such information in the first instance." This misconstrues the nature of the complaint investigation process.

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[3]Under section 372(c)(1), it is true, the chief judge may identify a complaint "by written order stating reasons therefor," whereas Fifth Circuit Rule 9(A) requires that the judge complained against be accorded "timely . . . written notice of the expanded scope . . ." These two procedural requirements admittedly are not precisely co-extensive, since Rule 9(A) does not require the special committee to state its reasons for expanding the scope of the investigation. This is not an important difference. The reasons for expansion of an investigation will always be implicit: that the special committee has developed reason to believe there may have been conduct prejudicial to the effective and expeditious administration of the business of the courts, or some disability, not alleged in a complaint. Under Rule 9(A), therefore, the named judge is accorded the same fundamental procedural rights that the judge would have been accorded if the chief judge had identified a new complaint or complaints under the statute. In other words, Rule 9(A) is not rendered inconsistent with the statute by virtue of any failure to accord the named judge fundamental procedural rights the statute would mandate.

In fact, as Judge McBryde points out, in the three orders in which Chief Judge Politz identified four complaints against the named judge, Chief Judge Politz did not state his reasons for doing so, as section 372(c)(1) required him to do. This procedural error did not perpetrate any fundamental unfairness on the named judge; the reasons for identifying the complaints were plain enough. A technical, harmless error of this kind surely does not call into question all of the proceedings that followed.

Where the complaint suggests there may be a pattern of objectionable conduct, the special committee may conduct some inquiry into whether or not such a pattern may exist. If there appears to be evidence that it may indeed exist, the committee may then formally expand the investigation to include other instances in which the pattern of objectionable conduct may have manifested itself, with notice to the judge complained against as required by Fifth Circuit Rule 9(A).

Not only is it permissible for a special committee to do this, it is affirmatively desirable. An individual complainant will often be in a poor position to allege or substantiate patterns of misconduct beyond his or her particular experience with the judge complained against. Where a complaint has some apparent substance, often the special committee would be shirking its statutory responsibility for the effective and expeditious administration of the business of the courts if it failed to make some inquiry into whether there was indeed a pattern of similar objectionable conduct.[4]

This does not permit the special committee to conduct an "unfettered investigation" "outside the scope of the complaint," as Judge McBryde would have it. The committee's inquiry is confined to the pattern of conduct raised in the complaint. The judge is charged with abusing counsel in a case; has he done so in other cases? Certainly the special committee cannot, in investigating a complaint of abusive treatment of counsel, conduct an inquiry into wholly unrelated matters such as

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[4]The purpose of this complaint process is to promote the effective and expeditious administration of justice, and as such the process works in tandem with informal and corrective mechanisms. Thus, when the chief judge receives a complaint, whether formal or informal, that charges a judge with abusive treatment of counsel in a particular case and that appears to have some substance, it is entirely appropriate for the chief judge to inquire into whether or not the judge has engaged in a pattern of similar abusive conduct that has manifested itself in other proceedings. If the inquiry suggests there may indeed be such a pattern, the chief judge may properly identify a complaint to trigger an investigation of the matter, or the chief judge may choose to deal with the problem informally. There is no reason why the same kind of process cannot be followed once a complaint has been given to a special committee for investigation.

whether the judge has demonstrated ethnic prejudice, engaged in ex parte contacts, or participated in political fundraising. But the special committee has not done so here.

In other words, Judge McBryde is correct when he argues that a special committee investigation is limited to the matters properly before the special committee, and that a special committee cannot range beyond the allegations of the complaint, fish for potential charges unrelated to the complaint, and then formally expand the investigation to encompass these new and unrelated charges. But the judge takes too narrow a view of what constitutes an investigation limited to the complaint. Where the complaint alleges abusive treatment of counsel, the special committee may permissibly inquire into other possible instances of such abuse, even though these other instances are not specified in the complaint. If evidence of a possible pattern of misconduct is found, the committee may then expand its investigation accordingly.

Judge McBryde complains that the judicial council ultimately ordered sanctions against him based entirely on incidents that were not the subject of any of the original five complaints filed or identified against him. Even if this assertion were true, it is of no consequence. The original five complaints unquestionably were sufficient under the statutory standards to justify the chief judge's appointment of a special committee to investigate their allegations. Once the special committee was in place, it properly expanded its investigation beyond the original five complaints. The matters raised in the expanded investigation were legitimately before the judicial council to precisely the same extent as the matters raised in the original complaints.

Notice to Judge McBryde of the expansion of the investigation. We will now turn to Judge McBryde's claim that the circuit council failed to give him timely and adequate notice of the expansion of its investigation, as Rule 9(A) requires.

On July 25, 1997, the special committee's counsel sent counsel for Judge McBryde a nine-page letter notifying the judge of a number of matters the investigation would be expanded to include, listed under the headings "conduct involving lawyers" and "conduct involving other judges." Each

matter was accompanied by a paragraph of explanation. This was done in preparation for the special committee's hearings scheduled for August 25-29, 1997.

Only five days before the onset of those hearings, on August 20, 1997, the special committee's counsel faxed Judge McBryde's counsel a letter adding three additional witnesses, with a brief explanation of the subject matter about which each would testify. For two of the witnesses, this explanation consisted of a statement that the witness would testify about Judge McBryde's conduct in a named case, without specifying the alleged conduct in question. The letter added that the special committee's counsel might present evidence concerning the judge's unspecified conduct in another named case.

After Judge McBryde protested that he needed more time to prepare to defend himself against all these additional allegations, further hearings were scheduled for September 29, 1997. Thus, when he asked for more time, he was given more time, an additional month. The hearings resumed September 29, 1997, through October 2, 1997.

In the meantime, on September 17, 1997, the special committee's counsel sent counsel for the named judge a letter listing the four witnesses he intended to call at the resumed hearings, and setting forth the projected subject matter of the testimony of each. Only two of these witnesses were new.

It is hard to think that the amount of explanation given Judge McBryde as to each new matter to be investigated was deficient. The letters sent by the special committee's counsel gave plain notice of the subject matter to be investigated. Portions of the notice given, it is true, merely referred to the judge's unspecified conduct in a named case. As a practical matter, though, it is hard to think that the judge would not be aware of what was meant. Ideally, perhaps, a fuller description could have been given, but we are by no means convinced that the judge's rights actually were prejudiced by any failure to provide a more detailed explanation.

It is true that when the judge was notified on July 25 of the expansion of the investigation, the judge had only a month until August 25 to prepare a defense to these new charges. Subsequently, however, the committee scheduled new hearings

for September 29 to give him an additional month. As for the additional matters specified in the special committee's counsel's August 20 fax, the judge had five weeks until September 29. Committee counsel's September 17 letter gave the judge only twelve days until the hearing, but it listed only two additional witnesses. On its face this seems adequate, and we see nothing specific in the judge's voluminous filings to suggest that the judge in fact was prejudiced by any lack of time to prepare.

Other procedural issues. Judge McBryde also objects to the lack of time he was afforded to file a response with the judicial council to the special committee's report and recommendation. He was served with a copy of the special committee report on December 4, 1997, with the judicial council scheduled to meet to consider the matter on December 17. This gave the judge less than two weeks to respond. The judge on December 8 filed a motion for enlargement of time to respond and for postponement of the meeting, which the special committee denied. When the judge did file a response, along with a motion to dismiss and a motion for recusal or disqualification, on December 15, the council members had only a day before their meeting to consider his filings.

At that December 15 meeting, however, no resolution was reached as to how to resolve the complaints against Judge McBryde. No vote was taken on the matter. The judge was given time to supplement his responses after the meeting, and he did file supplemental and "corrected" responses on December 22. The council's final order issued on December 31, so the council members had over two weeks to review and consider the judge's responses and motions before the matter was finally disposed of.

Considering that the special committee's report is 159 pages long and that it recommends, among other things, the one-year suspension of case assignments to an Article III judge, this is, to be sure, an expedited schedule. On the other hand, by December 15 counsel for Judge McBryde did manage to submit a 134-page response, a 62-page memorandum in support of their motion to dismiss, and a 93-page second motion for recusal or disqualification. It is hard to take seriously the judge's charge that he did not have an adequate opportunity to prepare

a response to the special committee's report when his attorneys in fact generated almost 300 pages of responsive argument.

A little over two weeks, it is true, was not a long time for the members of the judicial council to review almost 300 pages of argument. The council, however, has discretion to set its deadlines without regard to the possibility that it will be inundated with argument far in excess of the length limitations ordinarily imposed upon parties to an appeal. Only in extraordinary circumstances would this committee review a circuit council's scheduling of its deliberations. If the council believed it had adequate time to consider the judge's arguments -- and clearly it did believe so -- we see no occasion here to look further.

Judge McBryde's other procedural objections lack substance. Since the judicial council did not rely on any finding with respect to them, all of the judge's grievances regarding them are moot.

The judge's quarrels with an October 19, 1995 hearing held by the special committee are all meritless because that hearing was not part of these section 372(c) proceedings. Judge McBryde had filed with the judicial council a request that the council redress the reassignment, by Chief Judge Jerry Buchmeyer of the United States District Court for the Northern District of Texas, of two cases from Judge McBryde to himself. The council decided to hold a hearing on Judge McBryde's request, and further decided that since a special committee already had been convened to consider independent section 372(c) complaints against the judge, it would be efficient and convenient for the special committee to conduct this hearing. The judge was informed from the outset that the purpose of the hearing was to consider the judge's request for assistance pursuant to the council's section 332 authority, and that it was not part of the section 372(c) complaint proceedings.

At the hearing, once Judge McBryde had testified, he was told he could not be present for the remainder of the testimony. This was done because the committee feared the other witnesses would be intimidated by his presence. Such a procedure would have been impermissible in a section 372(c) proceeding as a violation of both the statute and the Fifth Circuit Rules, but it

was perfectly within the discretion of the judicial council in the exercise of its section 332 authority.

At a later time, certainly, the judges who presided over this section 332 hearing may have been influenced in their handling of the section 372(c) investigation by testimony they heard there, just as Judge McBryde alleges. But there is nothing wrong with this. As we will discuss in the next section, these are quasi-administrative/quasi-judicial proceedings, not judicial ones. Judges may bring to bear in section 372(c) proceedings information and impressions they may have gained in prior attempts to resolve the problems at issue. In fact, the statutory scheme encourages them to do so.

Disqualification of Certain Judicial Council Members

Judge McBryde argues that Chief Judge Politz and a few other judges (the members of the special committee and a district judge from Judge McBryde's district) should have recused themselves from the judicial council in this matter. Judge McBryde points out that Judge Politz was involved in Chief Judge Buchmeyer's reassignment to himself of two cases from Judge McBryde's docket, although Judge Politz was not involved in the underlying cases themselves. Judge McBryde also argues that Judge Politz and the other judges he wanted disqualified brought to the judicial council's proceedings information they gained outside the formal section 372(c) process.

In December 1997 the judicial council, in response to Judge McBryde's motion, ruled unanimously that there was no cause for any of the challenged judges to be disqualified from participating in the council's proceedings. We do not review that determination de novo. It is a mixed question of law and fact, as to which we give substantial deference to the judicial council's finding.

Judge McBryde's position misapprehends the nature of a section 372(c) proceeding. A chief judge need not recuse from participation in complaint proceedings merely because the proceedings involve matters with which the chief judge was concerned in the course of performing his administrative responsibilities as chief judge. This will often be the case. Indeed, the current system of judicial discipline strongly

encourages informal and corrective action by the chief judge to solve problems without resort to formal complaint proceedings. It would undermine this system if the chief judge were discouraged from doing his job at the informal and corrective stages for fear that he would later be required to recuse himself in any formal investigation.

In addition, an important reason that authority to investigate complaints is assigned to local judges under the current system is that local judges are expected to bring to bear their knowledge of the judge complained against, the complainant, and local circumstances. Under this system, the chief judge is ordinarily expected to be involved in and to inform himself about the matter at an early or pre-complaint stage, and to use the information and impressions gained thereby to help shape any later decisions in formal complaint proceedings. This is not a traditional judicial proceeding, in which a judge must recuse himself if he has extra-judicial knowledge about the case at bar. This is a quasi-judicial, quasi-administrative proceeding. A judge need not recuse from judicial council participation merely because the judge has precisely the knowledge of local personalities and circumstances the system wants him to have.[5]

This conclusion is strongly suggested on the face of the statute itself. The Act gives the chief judge authority to identify

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[5]Indeed, even if Judge Politz's recusal were sought in a traditional judicial proceeding rather than in a section 372(c) proceeding, there is authority that the kind of knowledge Judge Politz brought to the proceeding still would not require recusal. In Duckworth v. Department of the Navy, 974 F.2d 1140 (9th Cir. 1992), the Ninth Circuit held that the fact that then-Chief Judge Wallace had previously dismissed a section 372(c) complaint filed by the plaintiff against the district judge in that case did not require Judge Wallace to recuse himself from sitting on the panel hearing the plaintiff's appeal. Although Judge Wallace did have some prior knowledge of facts relevant to the appeal by virtue of ruling on the misconduct complaint, this was not "extrajudicial" knowledge requiring recusal under 28 U.S.C. § 455. Instead, the court ruled that "[t]he administrative actions of a judge in his or her official capacity [are] judicial, rather than extrajudicial" for recusal purposes, id. at 1143, so that information obtained by a chief judge in performing administrative functions under section 372(c) is not disqualifying as "extrajudicial" knowledge.

complaints on the basis of available information, section 372(c)(1), and to conclude proceedings on the ground that appropriate corrective action has been taken, section 372(c)(3)(B). Yet the statute directs the chief judge to appoint himself to any special committee convened to investigate a complaint. Section 372(c)(4)(A). Clearly the statute does not contemplate that the chief judge ordinarily should be precluded from service at the investigatory stage because of earlier efforts to resolve the matter short of investigation.

Indeed, Fifth Circuit Rule 17(a) states that even where the chief judge identified the complaint (here, Chief Judge Politz identified several of the complaints against Judge McBryde), "A chief judge who has identified a complaint under rule 2(J) will not be automatically disqualified from participating in the consideration of the complaint but may disqualify as a matter of personal discretion." Chief Judge Politz did not abuse that discretion by declining to disqualify here.

Judge McBryde makes much of the role Chief Judge Politz played in the dispute surrounding the reassignment of two cases to Chief Judge Buchmeyer. Assuming, arguendo, the truth of Judge McBryde's factual assertions regarding Chief Judge Politz's role in attempting to settle that dispute, we see no impropriety. At that time a special committee already had been appointed to investigate complaints against Judge McBryde. Chief Judge Politz apparently attempted to persuade Judge McBryde to modify his behavior to moot the whole matter and spare both himself and the Fifth Circuit what might be a long and costly investigation. This is precisely the kind of attempt at suasion the system means to foster and encourage.

For the same reasons, there is no substance to Judge McBryde's disqualification claims vis a vis other judges besides Judge Politz. Members of a special committee who are also members of the judicial council need not ordinarily recuse themselves from judicial council consideration of the special committee's report. There is no exceptional circumstance here that would dictate recusal. The fact that judicial council members may have had knowledge of the matter gained outside the section 372(c) proceedings, but in their capacity as members of the council, does not disqualify them.

The Judicial Council's Findings

Merits-relatedness. A central theme of Judge McBryde's submissions to this committee has been that essentially all of the conduct for which he is to be sanctioned is "directly related to the merits of a decision or procedural ruling," section 372(c)(3)(A)(ii), and therefore not cognizable under the Act at all. In response to the argument that he is being sanctioned not for the substance of his rulings but for a pattern of conduct, he replies that a judge cannot be sanctioned because of a pattern of allegedly improper rulings, any more than a judge could be sanctioned for a single allegedly improper ruling. Allegations are no less merits-related, he contends, because they challenge the merits of many rulings and not just some particular one.

Although a judge indeed may not be sanctioned out of disagreement with the merits of rulings, a judge certainly may be sanctioned for a consistent pattern of abuse of lawyers appearing before him. The fact that that abuse is largely evidenced by the judge's rulings, statements, and conduct on the bench does not shield the abuse from investigation under the Act. To the contrary, allegations that a judge has been habitually abusive to counsel and others may be proven by evidence of conduct on the bench, including particular orders or rulings, that appears to constitute such abuse.

To say that abuse of lawyers, or other forms of misconduct, that finds expression in a judge's rulings may be remedied under the Act is not to say that a judge's rulings themselves may be challenged under the Act. That of course remains the sole province of the court of appeals.

For the same reasons, sanctions in these circumstances do not trammel judicial independence. The sanctions are not based upon the legal merits of the judge's orders and rulings on the bench, but on the pattern of conduct that is evidenced by those orders and rulings.

The same principle holds true when it is alleged that a judge has accepted a bribe, has been motivated by racial, ethnic, or religious bias, or has issued rulings as part of an improper vendetta or some other illicit or vindictive motive. A judge could not evade discipline for such a pattern of conduct by arguing that this was an attack on his rulings, and that if litigants

believed his rulings were incorrect and the product of improper motivation, that was properly a matter for appeal, not for a misconduct proceeding. If a judge's behavior on the bench, including directives to counsel and litigants, were wholly beyond the reach of the Act, the Act would be gutted.

This view of the Act is amply supported by past decisions of this committee. In No. 94-372-001, 37 F.3d 1511 (1994), the complaint was that a district judge, in the course of recusing himself from a lawsuit in which the complainant was a party, issued a public order revealing that the reason for his recusal was that the complainant, whom the judge named, had previously filed a complaint of judicial misconduct against him under section 372(c). Complainant alleged that in so doing the judge violated the local D.C. Circuit rule imposing confidentiality on section 372(c) proceedings, including the identity of the complainant. This local rule served the purpose of protecting a complainant who desired confidentiality from fear of retaliation or other adverse consequences from the filing of a complaint.

The Judicial Council of the D.C. Circuit, by a 5-4 vote, dismissed the complaint in part because the judge's alleged misconduct arose "out of the performance of judicial duties as an Article III Judge." Indeed, the basis for the complaint was that certain aspects of the judge's order had constituted misconduct.

This committee soundly rejected the judicial council's position. This committee stated that the judicial council's

> "suggestion is based upon a misapprehension of the scope and purposes of § 372(c) and its cognizability provisions. . . .
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> "It would exempt from the Act a wide range of conduct that has nothing to do with the merits of judicial rulings. Under the majority's formulation, for example, any misconduct by a judge that occurred while a judge was performing judicial duties -- accepting bribes, uttering ethnic slurs, or communicating ex parte -- would not be cognizable under the Act.
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> "In fact, the central thrust of the Act is to make judges accountable for precisely this sort of conduct: conduct not

related to the merits of rulings that arises in the course of the performance of judicial duties . . . ."

Id. at 1515.

In No. 88-372-001 (1988), this committee affirmed a reprimand (albeit reducing it from a public reprimand to a private reprimand) of a district judge for stating, in the course of a judicial proceeding, that he would not permit the complainant, a well-known attorney, to practice in his courtroom. On Judge McBryde's logic, the district judge's statement would amount to a ruling regulating the appearance of attorneys in that judge's court. Once this ruling was applied in a particular case in which the complainant sought to appear, the ruling could be reviewed by the court of appeals, and if improper it could be vacated. Instead, both the Judicial Council of the First Circuit and this committee assumed, without explicitly discussing the point, that since the judicial council had found the district judge's statement to have been made as part of a personal vendetta directed at the complainant, the statement was subject to discipline, regardless of whether it could be characterized as a judicial ruling.[6]

Judge McBryde cites a host of orders issued by chief judges dismissing complaints on grounds of merits-relatedness. In some of these, it is true, the complainant went beyond merely attacking the merits of rulings, and raised allegations that particular rulings had resulted from some form of illicit motive or were examples of improper conduct. In those cases, however, the complainant failed to provide adequate supporting factual substantiation to justify an investigation into his or her claims of improper animus or conduct. Absent such factual support, these complaints' allegations were reduced to mere

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[6]Another instructive example -- in a matter that did not come before this committee -- is No. 88-2101 (Jud. Council 11th Cir. 1990). There a magistrate judge was publicly reprimanded by the Judicial Council of the Eleventh Circuit for ordering U.S. Marshals to take into custody a criminal defense attorney and bring that attorney, in handcuffs and chains as required by the Marshals' policies, to a hearing before the magistrate judge. In a sense, this directive constituted a "ruling" by the magistrate judge. Yet the magistrate judge's conduct, as evidenced by this "ruling," was deemed sanctionable because it was so palpably abusive toward counsel.

attacks on the merits of the rulings themselves, and thus were properly dismissed. The instant matter, of course, is quite different in that the claims of improper conduct were supported by considerable substance.

The burden of proof. Judge McBryde argues that a judicial council may take the "drastic step" of punishing a federal judge only when the evidence is "clear and convincing" that the judge has committed conduct prejudicial to the effective and expeditious administration of the business of the courts. In his view, application of the preponderance-of-the-evidence burden of proof commonly employed in civil litigation would be inappropriate.

There is nothing in the statute or the Fifth Circuit Rules that addresses this question. Nor is this committee aware of any decision in the eighteen years of the Act -- whether by this committee, a judicial council, or a chief judge-- delineating such a standard.

Judge McBryde points to authority that a clear and convincing evidence standard governs disciplinary proceedings against attorneys, citing In re Medrano, 956 F.2d 101, 102 (5th Cir. 1992). It is generally true, also, that a clear and convincing evidence standard is applied in most states' disciplinary proceedings against state judges. See, e.g., In re Deming, 108 Wash. 2d 82, 109, 736 P.2d 639, 653 (1987).

Even so, it is by no means clear that the clear and convincing evidence standard is the appropriate one. There are important distinctions between attorney discipline and discipline of most state judges, on the one hand, and federal judicial discipline short of impeachment on the other. The Fifth Circuit noted in Medrano, supra, that "[a] disbarment proceeding is adversarial and quasi-criminal in nature," and therefore "[a] federal court may disbar an attorney only upon presentation of clear and convincing evidence sufficient to support the finding of one or more violations warranting this extreme sanction." Id. at 102. A section 372(c) proceeding against a federal judge is neither adversarial nor quasi-criminal. The functional equivalent of disbarment, i.e., removal of the judge from office, is beyond the authority of the judicial council. In most states, by contrast, the state judges do not

enjoy a guarantee of life tenure, and removal from office is a possible outcome of the judicial discipline process.

It is of course true that suspension of the assignment of new cases to a judge for one year is a very severe sanction. Nonetheless these are not unequivocally "judicial" proceedings. They do not involve the adjudication of an Article III case or controversy. As this committee has stated, "While section 372(c) proceedings have an adjudicatory aspect, they also have an administrative and managerial character not present in traditional adjudication by courts." No. 93-372-001, 9 F.3d 1562, 1566 (1993). The circuit council's actions are taken in furtherance of the council's responsibilities for the administration of the courts. The matter is thus more administrative than quasi-criminal, so that a standard more exacting than the usual preponderance standard may not be necessary. It would be hard to argue that a chief judge and judicial council must be restrained by a clear and convincing evidence standard in whatever factual determinations they must make in the everyday process of administering the business of the circuit.

In any event, this committee need not determine this issue here. The evidence adduced by the special committee permits this committee to conclude that whether a preponderance standard or a clear and convincing evidence standard is applied, that standard was met here, as we will discuss in the next section.

The factual basis for the judicial council's sanctions. In its December 31, 1997 Order and Public Reprimand, the judicial council made the following findings of fact as to Judge McBryde's conduct:

> "Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.
>
> "Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of

> Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiedly attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts."

The judicial council, out of concern for the confidentiality interests of the witnesses who had testified before the special committee, opted not to make public any of the specific incidents that underlie this finding. As we conclude in the next section, this committee will not disturb the judicial council's determination that this degree of public disclosure, and not more, is appropriate at this time. This committee therefore cannot comment specifically on the evidence that supports the judicial council's findings, because that evidence remains confidential.

This committee has reviewed the record in detail, applying a review standard of substantial deference to the judicial council's fact finding. The committee concludes that whatever standard of proof might be required to support the judicial council's fact finding -- whether a clear-and-convincing-evidence standard or a preponderance-of-the-evidence standard -- the evidence adduced regarding Judge McBryde's patterns of conduct is more than sufficient to support the judicial council's findings. As to certain matters, the evidence is undisputed; as to many, Judge McBryde has disputed testimony and evidence against him. In all instances, however, there was more than ample evidence to permit the special committee, judging the credibility of the live witnesses before it, to reach the factual conclusions that it did.

The judge did, to be sure, present testimony from a number of lawyers who said they have been treated fairly by the judge, do not feel intimidated by him, and are happy to appear before him. The judge also presented testimony from jurors who have sat on cases presided over by him -- including jurors who sat on cases alleged to exemplify the judge's pattern of mistreatment

of counsel -- who said that they saw no mistreatment, that they appreciated the judge's efforts to move cases along, and that they enjoyed being impaneled on his jury. Even if this testimony is believed, however, there is nothing in it that undercuts the impressive mound of evidence that Judge McBryde has frightened and intimidated a significant portion of the local bar. The special committee and judicial council also were entitled to discount the testimony of jurors, who as laypersons without significant court experience cannot ordinarily be expected to understand the proper contours of the judge-counsel relationship and evaluate a judge's conduct in the light of that understanding.

The Judicial Council's Sanctions

The public reprimand. Judge McBryde argues that the public reprimand that the judicial council intends to issue would be improper because it does not adequately specify the conduct that gives rise to the reprimand. Although the special committee recommended that its long report be made public and appended to any public reprimand, the judicial council's order did not accept this recommendation, and would keep the report private. As a result, all that is public about the basis for the reprimand is the two-paragraph finding, that we quoted in the previous section, about the judge's conduct that appears in the text of the judicial council's Order and Reprimand. The council's public Order and Reprimand would not describe any of the specific incidents that underlie the reprimand.

To this Judge McBryde objects, stating, "Basic fairness dictates that if a man is to be held up before his community as a wrongdoer, there should at least be some explanation of what he has done and why it is wrong, so that the public can evaluate the merits of the reprimand and the subject of the reprimand can respond appropriately."

The judicial council's sanctions do not rest on only one or two specific incidents of misconduct, which one might ordinarily expect to be referred to in the text of a public reprimand. They are based instead on a broad pattern of conduct that manifested itself in many specific incidents, none of which standing alone may have justified a sanction. We think that where sanctions are based upon such a pattern of conduct, a

judicial council may provide the public a short general description of the pattern of conduct, rather than a litany of all the specific underlying details.

Also, the judicial council argues in justification that "not releasing the Report protects the privacy interests of the many witnesses who participated in this proceeding and whose testimony and experiences are summarized in the Report." Given that the council's order does at least provide a general description of Judge McBryde's misconduct, this committee defers to the judicial council's judgment as to the need to protect the privacy interests of witnesses.

Judge McBryde has a remedy under 28 U.S.C. § 372(c)(14)(C) for his concern that more of the confidential proceedings be made public. If, under that section, he requests in writing that all or any portion of the proceedings be made public, it can be done with the assent of the chief judge of the circuit. The chief judge's assent is required in order to protect any confidentiality interests that witnesses or complainants may have in the proceedings. If the chief judge were to grant such a request, in whole or in part, the chief judge could redact any materials to be made public in whatever manner the chief judge considered appropriate in order to preserve these privacy interests.

Judge McBryde argues that he has already pushed to make public the entire record of the proceedings, and the chief judge has not agreed. Judge McBryde does not wish to make public only the special committee report, with what he considers to be its one-sided view of the matter. Nonetheless, whatever the chief judge's position may have been in the past, Judge McBryde of course may renew his request in the future, when the circumstances surrounding the request conceivably may change.

The one-year suspension. Judge McBryde argues that the judicial council's order directing that no new cases be assigned to him for one year is an unconstitutional interference with the powers and prerogatives of an Article III judge.

As Judge McBryde acknowledges, however, this committee in the past has refused to consider challenges to the constitutionality of the Act, either on its face or as applied. In

no. 84-372-001, which involved a complaint of sexual harassment filed by clerk's office employees against a judge, the judge argued before this committee that the Act was unconstitutional on its face and that it would violate the Constitution to apply the Act to punish the conduct he was found to have engaged in. This committee declined to entertain these contentions, stating:

> "We have no competence to adjudicate the facial constitutionality of the statute or its constitutional application to the speech of an accused judge, however inappropriate or offensive his words may be. We are not a court. Our decisions are not subject to review by the Supreme Court of the United States. We sit in review of the action of the Circuit Council. The courts of the United States are open for the adjudication of such questions."

We similarly decline to undertake constitutional adjudication here.[7]

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[7]No court has ever adjudicated the constitutional validity of the Act's sanction of a temporary suspension, for a time certain, of the assignment of cases to a federal judge. Indeed, the instant matter is the first time this suspension sanction, as authorized by 28 U.S.C. § 372(c)(6)(B)(iv), has ever been invoked.

Chandler v. Judicial Council, 398 U.S. 74 (1970), did involve United States District Judge Stephen Chandler's challenge to a pre-Act order of the Judicial Council of the Tenth Circuit suspending the assignment of new cases to Judge Chandler. The Supreme Court, however, declined to reach the merits of this issue.

Judge McBryde quotes at length from Justices Black and Douglas who, in dissent in Chandler, argued that such a suspension worked an unconstitutional infringement on the independence of an Article III judge. The Court majority, by contrast, stated that for "a complex judicial system [to] function efficiently," judges need a "statutory framework and power whereby they might 'put their own house in order.' . . . But if one judge in any system refuses to abide by such reasonable procedures it can hardly be that the extraordinary machinery of impeachment is the only recourse." Id. at 85. Although the majority opinion drew back from attempting to define the permissible extent of a judicial council's power, it did state, "We see no constitutional obstacle preventing Congress from vesting in the Circuit Judicial Councils, as administrative bodies, authority to make 'all necessary orders for the effective and expeditious administration of the business of the

Judge McBryde further contends that the statutory provision authorizing a judicial council to "order . . . that, on a temporary basis for a time certain, no further cases be assigned to any judge or magistrate whose conduct is the subject of a complaint," 28 U.S.C. § 372(c)(6)(B)(iv), was intended by Congress to be used only for a "remedial" suspension of cases, whereas the judicial council's suspension here is impermissibly "punitive" in its goals.[8] Thus, he argues, its use for punitive purposes is not only unconstitutional but also in excess of the statutory authority granted to judicial councils by the Act. The judicial council has conceded, in its filings before this committee, that indeed it did have both punitive and remedial goals in mind in invoking the sanction.

We need not consider Judge McBryde's objections to the punitive aspects of the suspension of case assignments because we decline to affirm the suspension insofar as it was intended

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courts within [each] circuit.'" Id. at 86 n.7.

[8]Judge McBryde points to Senate legislative history, discussing an earlier version of the legislation that became the Judicial Conduct and Disability Act of 1980, 28 U.S.C. § 372(c), which stated,

> "It is important to point out the Committee's clear intention to use the word 'temporary' in this subsection. Serious constitutional problems may be raised concerning the power of the circuit council to prohibit the assignment of further cases to the judge in question. The use of the word 'temporary' is designed to convey the clear intention of the Committee that this sanction is to be used only on rare occasions and only as an interim sanction. For example, the refusal of the council to allow a judge to accept further cases while undergoing treatment for alcoholism or until the reduction of an excess backlog of cases are examples where this sanction may be invoked."

S. Rep. No. 96-362 (96th Cong., 1st Sess. 1979) at 10, reprinted in 1980 U. S. Code Cong. & Ad. News 4315, 4323-24. Legislative history from the House side also stated, "It is the view of the Committee that all the sanctions relating to the discipline or disability treatment of tenured judges mentioned above are temporary in nature; implicitly, a judge who has recovered from a disease or who has remedied the conditions that caused the sanction can and should be restored to office." H.R. Rep. No. 96-1313 (96th Cong., 2d Sess. 1980), at 12.

to punish Judge McBryde for past misconduct. Even with substantial deference to the judicial council's firsthand judgment about what constitutes an appropriate punishment, this committee believes that the judicial council's public reprimand -- a serious sanction -- is a sufficient punishment for the judge's past pattern of abusive conduct.

We do, however, affirm the suspension, in modified form, as a remedial measure intended to ameliorate Judge McBryde's behavior in the future. The special committee made it clear in its report that it did intend the suspension of new case assignments to serve very substantial remedial purposes. The special committee expressed its concern that during the committee's hearings,

> "Judge McBryde evinced no reflection or remorse concerning the totality of his conduct. . . . Aside from one or two instances . . . , Judge McBryde refused to acknowledge the impropriety of his actions. His repeated responses that his actions were proper and appropriate bespeak both of denial and the probability that, absent self-reappraisal, such conduct will not abate.
>
> "Depriving Judge McBryde of new assignments for this period will not prevent continued abuse, but it will provide him some opportunity for deep reflection, which is necessary and desirable."

The judicial council adopted the special committee report in this regard, since the council adopted that report "to the extent relevant to the action below."

We have thoroughly reviewed the evidence and we find that it justifies the judicial council's conclusions that Judge McBryde has generally refused to acknowledge the impropriety of his actions, and that an "opportunity for deep reflection" is desirable to permit him to consider the need to reform his conduct in the future. The judge has yet to give any indication that he accepts he has a problem, and until he does so there is little hope for improvement. A lightening of his case load will permit him to engage in the "self-appraisal" and "deep reflection" referred to by the special committee. The purpose of this suspension of new case assignments, therefore, is the same as in the case of a remedial suspension of new cases for a judge

with a substance abuse problem, or with some other physical or mental problem, who refuses to take steps to confront the problem. Thus, we uphold the suspension as aimed at modifying Judge McBryde's pattern of behavior toward attorneys, court personnel, and others, not as punishing him for past misbehavior.

As formulated by the judicial council, the suspension is for the definite period of a year. In keeping with the purely remedial nature of the suspension, however, the suspension should not continue once it has fairly achieved its remedial purpose. The suspension should terminate in the event that, during the year, Judge McBryde shows significant signs of modifying his conduct. In the analogous situation of a one-year suspension of case assignments to a judge with a substance abuse problem, for example, one would expect the suspension to abate if the judge completed successful treatment for the problem within the year. We therefore modify the terms of the suspension of new case assignments in order to bring it within Judge McBryde's power to effect an end to the suspension before the expiration of a year.

The committee directs the judicial council to terminate the suspension of new case assignments before the expiration of the year if the council finds, either upon an application by Judge McBryde or on its own motion, that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith, and that he has made substantial progress toward improving his conduct.

The committee notes, in affirming the one-year suspension as purely remedial, that we cannot be sure that all of the members of the judicial council who voted for the suspension (which was approved by a vote of 13 to 6) would have voted for a purely remedial suspension. It is possible that some council members may have supported the suspension only for purposes of punishment, or for both punitive and remedial purposes. Nonetheless we see no need to remand this matter to the judicial council for the council's consideration of the advisability of a purely remedial suspension. The judicial council of course may reconsider its suspension at any time it sees fit to do so. It goes without saying that if the judicial

council concludes, for example, that a remedial suspension is not appropriate, that a one-year suspension is too lengthy for purely remedial purposes, or that the period of time that has elapsed since Judge McBryde learned of the council's decision to impose a public reprimand has been sufficient to give the judge an opportunity to reflect, this committee's affirmance of a one-year remedial suspension in no way precludes the judicial council from revisiting the matter.

The reassignment order. There is plenty of evidence in the record to support the judicial council's implicit conclusion that there was a significant risk that Judge McBryde might attempt to retaliate in some fashion against witnesses who had testified against him, or at least that witnesses reasonably perceived such a risk. The judicial council has a strong interest in protecting the integrity and effectiveness of its investigation, which could be seriously hampered if witnesses believed they would be left unprotected against such retaliation. Thus, the judicial council ordered that "Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A."

Judge McBryde argues that the judicial council lacks authority to order the recusal of a judge from any case. Such authority, he asserts, is reserved to the court of appeals on review of determinations by the district judge on recusal motions properly brought under 28 U.S.C. §§ 144 and 455. These recusal decisions are decisions on the merits just like any other rulings handed down by a district judge. Thus, "[t]he complaint procedure may not be used to have a judge disqualified from sitting on a particular case. A motion for disqualification should be made in the case." Rule 1(e) of the Illustrative Rules Governing Complaints of Judicial Misconduct and Disability.

We do not quarrel with the proposition that it is for the courts, not for a non-court such as the judicial council, to

determine the application of sections 144 and 455 in particular cases. That is not, however, what the council's reassignment order does.

A judicial council, exercising its authority under 28 U.S.C. § 372(c)(6)(B)(vii) to "order . . . such other action as it considers appropriate under the circumstances," may reassign cases as a result of a complaint proceeding if to do so is appropriate to foster the effective and expeditious administration of judicial business. Such a reassignment order is an entirely different thing from recusal under the recusal statutes, and is not governed by the standards set out in those statutes.[9] The council properly exercised just such authority by issuing the order for the purpose of protecting the integrity of its proceedings by guarding its witnesses against what it concluded was a genuine or reasonably perceived risk of retaliation by Judge McBryde.

Judge McBryde counters that nevertheless the judicial council is not a court, cannot exercise judicial power, and cannot issue rulings that dispose of issues in Article III cases and controversies. If Congress has given the courts of appeals authority to order reassignment of a district judge on some basis other than application of the recusal statutes, there is no question that those courts may properly exercise that authority. If, however, case reassignment amounts to a ruling in a case, involving exercise of the judicial power, then, the judge argues, the judicial council may not issue such an order.

The short answer is that the matter of case assignments is an administrative one, and does not involve the exercise of judicial power. Under 28 U.S.C. § 137, for example, where the judges of a district court do not agree on a system for case assignments

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[9]The judicial council analogizes its reassignment order to an order issued by a court of appeals under 28 U.S.C. § 2106, which has been interpreted to permit the court of appeals to reassign cases from one district judge to another. Such an order under section 2106 is an entirely different thing from a recusal order under the recusal statutes. As such, a section 2106 order is adjudicated under a different standard than the recusal standards applicable under 28 U.S.C. §§ 144 and 455. Liteky v. United States, 510 U.S. 540, 554 (1994).

among district judges, the judicial council, by exercise of its administrative authority, may impose a case assignment system. This does not inject the judicial council into judicial rulings in particular cases.

The council's reassignment order is akin to action under section 137. The council is exercising its administrative authority, not case-decisional authority, to protect the integrity of its proceedings by directing that Judge McBryde not participate in cases where his participation would threaten that integrity, i.e., in cases where witnesses adverse to him appear as counsel. Thus its action has nothing whatsoever to do with the circumstances of the particular cases in which those witnesses happen to appear. The council does not purport to direct Judge McBryde how to decide motions to recuse or how to apply the recusal statutes.

Only the judicial council is in a realistic position to take this action. The possibility of subsequent piecemeal rulings by the court of appeals, entered only months later in one or more cases, directing Judge McBryde not to participate in such cases would be less effective in protecting the integrity of the section 372(c) proceedings. Adverse witnesses awaiting such rulings would have much less assurance that they would be protected against feared retaliation.

Finally, Judge McBryde argues that the judicial council's reassignment order is unwise in its details and in its practical effects. He contends that the order gives the affected attorneys and their clients the kinds of opportunities for judge-shopping that the federal judicial system ordinarily frowns upon.

It is for the judicial council to determine how best to balance concerns about judge-shopping against the need it sees to protect witnesses against feared retaliation. The Act confers upon the judge complained against the right to seek Judicial Conference review in order to ensure the fairness and propriety of circuit council proceedings and orders affecting the judge's interests. When a judge argues that aspects of a council order -- wholly apart from their impact on the judge -- manifest an unwise and ill-considered approach to judicial administration, this begins to take the committee's review proceeding beyond its intended purpose.

This is not to say that this committee lacks authority to examine and modify the practical details and implementation of the council's reassignment order. We are loathe to exercise any such authority in the absence of some extraordinary circumstance, and we see nothing to justify such intervention here. As the council has pointed out, if the reassignment order causes problems, the council can issue additional supplemental orders to address them.

We have considered all of Judge McBryde's other arguments and find them meritless.

Conclusion

This committee affirms the December 31, 1997 Order and Public Reprimand issued by the Judicial Council of the Fifth Circuit in all respects except the following. Section 2 of the Order and Public Reprimand is modified to state: "Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order, unless and until the Council finds that Judge McBryde's conduct indicates that he has seized the opportunity for self-appraisal and deep reflection in good faith and that he has made substantial progress toward improving his conduct;".

This committee's stay of the judicial council's Order and Public Reprimand is hereby terminated.

FOR THE COMMITTEE

/s/
William J. Bauer
United States Circuit Judge[10]

September 18, 1998

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[10]This opinion was prepared by Judge William J. Bauer, with United States Circuit Judge Stephanie K. Seymour, United States Circuit Judge Cornelia G. Kennedy, United States District Judge Gordon Thompson, Jr., and United States District Judge Anthony A. Alaimo concurring.

APPENDIX D

THE JUDICIAL COUNCIL
FIFTH JUDICIAL CIRCUIT

No. 95-05-372-0023
No. 95-05-372-0023A
No. 95-05-372-0023B
No. 95-05-372-0023C
No. 95-05-372-0023D

IN RE: MATTERS INVOLVING UNITED STATES DISTRICT JUDGE JOHN H. McBRYDE, UNDER THE JUDICIAL CONDUCT AND DISABILITY ACT OF 1980

ORDER AND PUBLIC REPRIMAND

WHEREAS a Special Investigating Committee of the Council (the "Special Committee"), pursuant to 28 U.S.C. § 372(c)(5) and Rule 9(A) of the Fifth Circuit's Rules Governing Complaints of Judicial Misconduct or Disability, conducted an investigation, held hearings over nine days during which over fifty witnesses testified, and received evidence regarding complaints against, and the conduct of, Judge John H. McBryde of the United States District Court for the Northern District of Texas;

WHEREAS, pursuant to 28 U.S.C. § 372(c)(5), the Special Committee issued a Report to the Council dated December 4, 1997; and

WHEREAS the Council has considered the record, the Special Committee's Report, the Responses thereto, and statements by counsel and Judge McBryde at the Council's December 17, 1997 meeting.

To the extent relevant to the action taken below, the Council adopts by a clear majority vote the Special Committee's Report, Findings of Fact, and Recommendations. Based thereon:

1. The Council hereby PUBLICLY REPRIMANDS Judge McBryde, pursuant to 28 U.S.C. § 372(c)(6)(B)(vi), for conduct

prejudicial to the effective and expeditious administration of the business of the courts within the Circuit and inconsistent with Canon 2(A) and Canon 3(A)(3) of the Code of Conduct for United States Judges.

Judge McBryde has engaged in a continuing pattern of conduct evidencing arbitrariness and abusiveness that has brought disrepute on, and discord within, the federal judiciary. This conduct is unacceptable and damaging to the federal judiciary.

Judge McBryde's intemperate, abusive and intimidating treatment of lawyers, fellow judges, and others has detrimentally affected the effective administration of justice and the business of the courts in the Northern District of Texas. Judge McBryde has abused judicial power, imposed unwarranted sanctions on lawyers, and repeatedly and unjustifiably attacked individual lawyers and groups of lawyers and court personnel. This pattern of behavior has had a negative and chilling impact on the Fort Worth legal community and has, among other things, prevented lawyers and parties from conducting judicial proceedings in a manner consistent with the norms and aspirations of our system and is harmful to the reputation of the courts.

2. Pursuant to 28 U.S.C. § 372(c)(6)(B)(iv), no new cases are to be assigned to Judge McBryde for a period of one (1) year from the effective date of this Order; and

3. Pursuant to 28 U.S.C. § 372(c)(6)(B)(vii), Judge McBryde, for a period of three (3) years from the effective date of this Order, is not to participate in (i) cases now pending before him (other than any as to which there are appellate proceedings) in which any of the attorneys listed on Attachment A are currently involved, and (ii) any and all cases filed after the effective date of this order in which the initial notice of appearance includes any of the attorneys listed on Attachment A.

4. Consistent with 28 U.S.C. § 332(d)(2), the Council directs all judicial officers and employees within the Circuit, particularly the Chief Judge of the Northern District of Texas and the Clerk of the Court for the Northern District of Texas, to

take all necessary steps to carry into effect the above orders of the Council.

5. The Council hereby directs that implementation of this Order and Public Reprimand shall be stayed for 30 days after entry so that Judge McBryde may seek to appeal to, and obtain an additional stay from, the Judicial Conference of the United States. This Order shall also remain sealed during the period of any stay thereof.

This order is issued on the date recited below but shall not become effective until all stays have expired or been lifted.
New Orleans, Louisiana, this 31st day of December 1997.

FOR THE COUNCIL:

/s/
HENRY A. POLITZ, CHIEF JUDGE

ATTACHMENT A

Jay K. Gray
Matthew Golla
David Martin
Peter Fleury
Tim Henry
Frank McCown
Paul Stickney
Dominic Gianna
John Teakell
Arch McColl
Ira Kirkendoll
Michael Sanders
Richard Roper
Marc Barta
Paul Gartner
Michael Heiskell
Art Brender
Wayne Hughes
Claude Brown
Michael Snipes
Chris Milner
William Martin
Fred Schattman